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

In the Matter of)	
)	
Rural Health Care Program)	CC Docket No. 02-60
)	
Request for Review by Windstream)	
Communications, LLC of Decision by the)	
Universal Service Administrator)	

OPPOSITION IN PART TO REQUEST FOR REVIEW

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SUMMARY

In March 2017, the Rural Health Care Division (“RHCD”) of the Universal Service Administrative Company (“USAC”) denied requests for funding submitted under the Rural Health Care Telecommunications Program (“Telecom Program”) on behalf of three rural health care providers (“HCPs”). The RHCD determined that the relationship between ABS Telecom LLC (“ABS”), its Managing Partner, Gary Speck, and Windstream Communications, LLC (“Windstream”) created a conflict of interest that violated unspecified Commission rules (“Rules”) by undermining fair and open bidding to provide the services for which the HCPs sought funding. Specifically, the RHCD found that Mr. Speck’s dual role as the HCPs’ consultant and Windstream’s sales agent or “channel partner” created the conflict of interest.

The RHCD’s decision spawned four appeals. The HCPs appealed to the Commission. ABS and Mr. Speck (collectively “ABS”) requested USAC to review the RHCD’s decision. For its part, Windstream submitted two appeals asking USAC to review the RHCD’s action and its subsequent Commitment Adjustment Letters (“COMADs”). ABS filed “third-party” responses to Windstream’s requests pursuant to § 54.721(d) of the Rules.

USAC disposed of the three appeals on the same day by three separate letter decisions – which ABS refers to as the “ABS Decision,” the “Windstream Decision,” and the “Windstream COMADs Decision” – even though all three decisions addressed exactly the same issues. The “Administrator’s Decision on the Appeal” was identical in each decision. No mention was made in the Windstream Decision or the Windstream COMADs Decision that ABS had filed responses in the “proceedings” in which the decisions were issued. USAC even refused to give ABS copies of the Windstream Decision and the Windstream COMADs Decision.

On August 23, 2018, Windstream filed a request that the Commission review the two

USAC decisions (“Windstream Appeal”), and it served its request on ABS. Although it agrees with much of what Windstream argues, ABS opposes the Windstream Appeal to the extent that it seeks equitable relief based on Windstream’s false claim that it was unaware at the time of the competitive bidding processes that Mr. Speck provided consulting services to the HCPs while acting as its sales agent.

From the time ABS and Windstream entered into their channel partner agreement on March 15, 2011 until April 19, 2016, when Windstream terminated the agreement, the Telecom Program Rules did not: (1) forbid Mr. Speck from serving as a consultant for the HCPs and as a channel partner for Windstream; or (2) require the HCPs, ABS, Mr. Speck, or Windstream to conduct fair and open competitive bidding processes. Because the Telecom Program Rules afforded Windstream no notice that it was required to participate in fair and open competitive bidding processes, due process would prohibit the Commission from penalizing Windstream, even if the competitive bidding processes that resulted in its selection as the service provider were in fact not fair and open.

In its ABS Decision, USAC found that the “nature of the relationship” between Mr. Speck and Windstream was inherently inconsistent with the competitive bidding requirement of § 54.603(a) of the Telecom Program Rules, because it gave Mr. Speck the *ability* to influence the HCP’s competitive bidding process. However, it would have been inherently inconsistent with competitive bidding had Mr. Speck *actually* discouraged prospective bidders from submitting bids or excluded them from the process altogether. Mr. Speck has denied under penalty of perjury that he did anything of the sort.

USAC intends to recover funds that it properly disbursed to Windstream, because it subsequently determined that there had been a violation of the Commission’s “requirements” for

the Telecom Program. However, USAC can only recover funds that had been disbursed in violation of a Rule that implements either § 254 of the Communications Act of 1934 (“Act”) or a substantive Telecom Program goal. USAC has admitted that it did not find a violation of any specific Rule.

A Commission order requiring Windstream to return funds disbursed to it by USAC, because of a violation of a Rule, would constitute the imposition of a sanction. The Commission can impose a monetary sanction on Windstream only as authorized by the forfeiture provisions of § 503(b) of the Act. It cannot order Windstream to forfeit funds unless it first issues Windstream a notice of apparent liability for forfeiture (“NALF”), and then determines that Windstream willfully or repeatedly failed to comply with a Rule. However, the Commission is barred from issuing a forfeiture order against Windstream for violating any Rule in connection with the competitive bidding processes in this case, because the applicable one-year statute of limitations has expired.

The administrative record, which the Commission must review *de novo*, contains declarations under penalty of perjury, and other documentary evidence, showing that: (1) Windstream’s District Dealer Manager and its Assistant Vice President of Indirect Sales knew prior to the signing on the channel partner agreement on March 15, 2011, that Mr. Speck would be acting as a consultant for the HCPs while serving as Windstream’s channel partner; (2) Mr. Speck obtained the approval of Windstream’s management and its legal department to serve as a consultant to the HCPs and as Windstream’s channel partner; and (3) Windstream’s Vice President – Channel Sales, its Senior Channel Manager, and its legal department were aware in early 2015 that Mr. Speck was acting as its channel partner and as a consultant for Hunt Memorial Hospital District in connection with its participation in the Telecom Program. The Commission should find

on the basis of such evidence that there is a substantial and material question of fact as to whether Windstream violated § 1.17 of the Rules by making written statements, both in its submissions to USAC and in the Windstream Appeal, that were either intentionally incorrect or misleading, or were made without a reasonable basis for believing that they were correct and not misleading. Until that question is answered, the Commission cannot grant Windstream's request for equitable relief and it certainly should not focus its remedial efforts on ABS.

ABS requests that the Commission: (1) consolidate the ABS Appeal and the Windstream Appeal for *de novo* review; (2) hold that USAC violated due process and the *ex parte* rules; (3) hold that only § 54.603(a) of the Telecom Program Rules applied to the HCPs' competitive bidding processes; (4) reverse the ABS Decision, the Windstream Decision, and the Windstream COMADs Decision; (5) hold that § 54.603(a) of the Telecom Program Rules was not violated by the HCPs, ABS, Mr. Speck or Windstream; (6) direct USAC to make the payments owed to Windstream under the original commitment letters; and (7) issue Windstream a NALF for willfully and repeatedly violating § 1.17 of the Rules.

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OPPOSITION IN PART TO REQUEST FOR REVIEW

ABS Telecom LLC (“ABS”) and its Managing Partner, Gary Speck, by their attorney and pursuant to § 1.45(b) of the Commission’s rules (“Rules”), hereby oppose in part the Request for Review filed by Windstream Communications, LLC (“Windstream”)¹ with respect to two decisions of the Universal Service Administrative Company (“USAC”) denying funding under the Universal Service Rural Health Care (“RHC”) Telecommunications Program (“Telecom Program”) and seeking recovery of funding from Windstream.

INTRODUCTION

The decision of USAC’s Rural Health Care Division (“RHCD”) to deny the funding request of three rural health care providers (“HCPs”), because Mr. Speck served as a consultant to the HCPs and represented a Windstream sales agent or “channel partner,” spawned four appeals. The HCPs went to the Commission asking for rule waivers.² ABS and Mr. Speck (collectively “ABS”) requested USAC to review the RHCD’s decision. For its part, Windstream submitted two appeals asking USAC to review the RHCD’s action and its subsequent Commitment Adjustment Letters (“COMADs”). ABS filed “third-party” responses to Windstream’s requests pursuant to §

¹ We will refer to the Request for Review as the “Windstream Appeal.”

² See Windstream Appeal at Ex. E.

54.721(d) of the Rules.³

Remarkably, USAC disposed of the three “letters of appeal” before it on the same day by three separate letter decisions, even though all three decisions addressed exactly the same issues.⁴ The “Administrator’s Decision on the Appeal” was identical in each letter. USAC simply repeated the following virtually word-for-word:

USAC is unable to grant the Appeal because Mr. Speck's dual role as a consultant for the Applicants and channel partner for Windstream created a conflict of interest that tainted the competitive bidding process for the FRNs listed in the Appendices. Therefore, because the competitive bidding process that resulted in the Applicants' selection of Windstream as the service provider for these funding requests was not fair and open, in violation of the FCC's rules and requirements,⁴⁷ USAC denies the Appeal.⁵

No mention was made in USAC’s Windstream Decision or its Windstream COMADs Decision that ABS was a party to the “proceedings” that led to the decisions, or specifically that ABS filed responses in both proceedings. Moreover, USAC did not send copies of the two decisions to ABS even though they both contained: (1) the finding that Mr. Speck’s dual role as a consultant for the HCPs and Windstream’s channel partner “created a conflict of interest that tainted the competitive bidding process,” and (2) the legal conclusion that, as a result of the conflict of interest, the competitive bidding process “was not fair and open, in violation of the FCC’s rules

³ See Letter from Russell D. Lukas to USAC (Sept. 21, 2017); Letter from Russell D. Lukas to USAC (Dec. 29, 2017) (“ABS Second Response”). ABS’ first response was delayed, because USAC forced ABS to obtain Windstream’s request pursuant to a Freedom of Information Act (“FOIA”) request.

⁴ Attached hereto, and incorporated herein by reference, is the Request for Review that ABS submitted with respect to USAC’s actions (“ABS Appeal”). Exhibit 1 to the ABS Appeal is a copy of USAC’s letter of June 29, 2018 (“ABS Decision”) denying ABS’ request for review of the RHCD’s decision. Exhibit 7 is USAC’s letter denying Windstream’s request for review of the RHCD’s action (“Windstream Decision”). Exhibit 8 is USAC’s June 29, 2018 letter denying Windstream’s request for review of the issuance of the COMADs (“Windstream COMADs Decision”).

⁵ ABS Appeal, Ex. 1 at 9 (ABS Decision at 9). The language of the Windstream Decision is identical to that of the ABS Decision quoted above except that the footnote is number 33. See *id.*, Ex. 7 at 6. The Windstream COMADs Decision is identical except for the phrase “listed in Appendix A” ends the first sentence and the footnote number is 45. See *id.*, Ex. 8 at 8.

and requirements.”⁶

Shortly after receiving the ABS Decision, undersigned counsel wrote a letter to USAC in which he stated:

Since the Windstream and ABS appeals involve substantially the same issues, and present conflicting claims, I expected that the RHCD would consolidate the appeals and act on them simultaneously. Therefore, I was surprised when the RHCD’s decision only addressed the ABS appeal. However, if the RHCD has issued a decision on the Windstream appeal, but failed to serve the decision on me, please do so posthaste. If the RHCD has not acted on that appeal, please give me a copy of the decision as soon as it is issued.⁷

USAC refused to give ABS’ counsel a copy of the Windstream Decision, and it did not disclose that it had also issued the Windstream COMADs Decision. Instead, USAC informed ABS as follows:

USAC is unable to share with you a copy of the appeal decision issued to Windstream. As the Commission’s ex parte rules do not apply to decisions made by USAC, ABS ... is not entitled to a copy of the decision on the appeal filed by Windstream. If you would still like a copy of the appeal decision letter issued to Windstream, you can either request this documentation from Windstream or, alternatively, submit a [FOIA] request in accordance with the requirements set forth in 47 C.F.R. § 0.461.⁸

The issuance of three repetitive decisions, and USAC’s refusal to share all three of its decisions with ABS, evinces USAC’s general intent to shield its decision-making from public scrutiny, as well as its specific intent to deny ABS access to documents that it has a right to see. Even if USAC was a federal agency that could invoke FOIA, which it is not,⁹ there is no statutory exemption to the disclosure requirement under 5 U.S.C. § 552(b) that would allow USAC to

⁶ ABS Appeal, Ex. 7 at 6, Ex. 8 at 8.

⁷ *Id.* at 29, Ex. 9 at 1.

⁸ *Id.* at 29, Ex. 10 at 1. At the request of undersigned counsel, counsel for Windstream graciously provided ABS with courtesy copies of the Windstream Appeal Decision and the Windstream COMADs Decision. *See id.* at 29-30.

⁹ *See id.* at 35-39.

withhold the Windstream Appeal Decision and the Windstream COMADs Decision from ABS, while it provided ABS with the substantively identical ABS decision. The Commission should hold that USAC's refusal to treat ABS as a party to its proceedings, or to consider the relevant evidence proffered by ABS, was a gross derogation of its duties as a decision-maker under the Rules.¹⁰

ARGUMENT

I. THE COMMISSION'S "FAIR AND OPEN" BIDDING STANDARD AND REQUIREMENTS DO NOT APPLY TO THE TELECOM PROGRAM

ABS agrees entirely with Windstream's threshold argument that USAC improperly enforced fair and open competitive bidding requirements that did not apply to the parties below. *See* Windstream Appeal at 7-9; ABS Appeal at 30-35. Significantly, in its ABS Decision, USAC finally admitted that there had been no violation of the Telecom Program Rules in this case:

As an initial matter, USAC's denial of the funding requests ... was not based on a violation of [§] 54.603 of the Telecom Program [R]ules, but rather was based on a violation of the fair and open competitive bidding requirements, which, for the reasons stated above, apply to the Telecom Program and prohibit precisely the type of relationship the Applicants' contact person and ABS' employee, Mr. Speck, had with Windstream.¹¹

Of course, the Commission has not adopted Telecom Program Rules regarding "consultant participation" in the Telecom Program. *Promoting Telehealth in Rural America*, 32 FCC Rcd 10631, 10659 (¶ 88) (2017) ("*NPRM*"). So what USAC actually found was that Mr. Speck had violated "USAC *procedures* [which] prohibit consultants ... who have an ownership interest, sales commission arrangement, or other financial stake with respect to a bidding service provider from ... serving as another point of contact on behalf of a [HCP applicant]." *Id.* (emphasis added). *See*

¹⁰ *See Daniel E. Riordan*, 22 FCC Rcd 4316, 4318 (¶ 9) (2007) ("USAC must act in accordance with the Commission's orders, rules and directives").

¹¹ ABS Appeal, Ex. 1 at 7 (ABS Decision at 7).

ABS Appeal at 33-34.

USAC effectively decided that Windstream and Mr. Speck violated a “fair and open” competitive bidding rule that the Commission is proposing to adopt in WC Docket No. 17-310 (“Docket 17-310”). *See NPRM*, 32 FCC Rcd at 10676; ABS Appeal at 34-35. Proposed § 54.603(b)(1) of the Telecom Program Rules, if adopted, will provide that “[a]ll entities participating in the [Telecom] Program, including vendors, must conduct a fair and open competitive bidding process, consistent with all applicable requirements.” *NPRM*, 32 FCC Rcd at 10676. In effect, USAC found that Mr. Speck violated proposed § 54.603(b)(2), which someday could provide that “[a]ny vendor who submits a bid, and any individual or entity that has a financial interest in such a vendor, is prohibited from ... serving as the point of contact on behalf of the applicant.” *Id.*

If the Commission ultimately adopts the entirely new § 54.603 that it is proposing for the Telecom Program in Docket 17-310, the fair and open bidding requirements of § 54.603(b) will “operate[] only prospectively.” *AT&T Co. v. FCC*, 978 F.2d 727, 732 (D.C. Cir. 1992), *cert. denied sub nom., MCI Telecommunications Corp. v. AT&T Co.*, 509 U.S. 913 (1993). *See* ABS Appeal at 35 & n.149. Therefore, the new requirements cannot be applied retroactively to Windstream and Mr. Speck, “because a rulemaking can affect the conduct of parties only *prospectively*; it does not determine the legality of past conduct.” *AT&T Co.*, 978 F.2d at 732 (emphasis in original). If the fair and open bidding requirements that the Commission is proposing to codify in Docket 17-310 can never be applied to past conduct, USAC could not apply the same requirements to determine the legality of Windstream’s and Mr. Speck’s conduct dating back to March 15, 2011, when Windstream executed a “channel partner agreement” with ABS. Windstream Appeal at 4.

II. THE COMMISSION WOULD VIOLATE DUE PROCESS IF IT UPHOLDS USAC AND PENALIZES WINDSTREAM

ABS agrees with Windstream that, if the Commission upholds the USAC decisions, it would violate due process as well as the prohibition against the retroactive application of rules. *See* Windstream Appeal at 9 & n.33. A punishment fails to comply with due process if the regulation under which it is obtained “fails to provide a person of ordinary intelligence fair notice of what is prohibited, or is so standardless that it authorizes or encourages seriously discriminatory enforcement.” *FCC v. Fox Television Stations, Inc.*, 132 S. Ct. 2307, 2317 (2012) (quoting *United States v. Williams*, 553 U.S. 285, 304 (2008)). When Windstream’s legal department authorized ABS to be both a Windstream channel partner and a consultant for the HCPs in early March 2011,¹² there were no fair and open competitive bidding requirements anywhere in Part 54 of the Rules, and certainly none in Subpart G which governed universal service support for HCPs.¹³ Section 54.603(a) of the Subpart G Rules only provided as follows:

Competitive bidding requirement. To select the telecommunications carriers that will provide services eligible for universal service support to it under this subpart, each eligible [HCP] shall participate in a competitive bidding process pursuant to the requirements established in this subpart and any additional and applicable state, local, or other procurement requirements.¹⁴

The competitive bidding rule that the Commission published and was available to Mr. Speck, the HCPs, and Windstream – including Charles Bates, Michelle Kadlacek, and its legal department¹⁵ – gave them fair notice that the HCPs had to participate in a competitive bidding process that met the requirements set forth generally in Subpart G of Part 54 of the Rules, and

¹² *See* ABS Appeal at 11-12, Ex. 3 at 2-3 (¶¶ 4-6), Ex. 4 at 2 (¶¶ 6, 7).

¹³ *See* 47 C.F.R. §§ 54.500-54.625 (2010).

¹⁴ *Id.* § 54.603(a).

¹⁵ *See* ABS Appeal at 10-12, Ex. 3 at 2-3 (¶¶ 4-6), Ex. 4 at 2 (¶¶ 6, 7).

specifically § 54.603(b) of the Rules, as well as “any additional and applicable state, local, or other procurement requirements.” The Subpart G Rules imposed no requirements whatsoever on consultants or service providers with respect to the competitive bidding process, and those Rules provide no notice whatsoever to ABS or Windstream that Mr. Speck could not act as a consultant and contact person for the HCPs and be a Windstream channel partner.

There was no fair and open competitive bidding requirement in the Subpart G Rules at all until § 54.642(b) of the Rules governing the Health Connect Fund (“HCF”) went into effect on March 1, 2013. But, as Windstream pointed out,¹⁶ when the Commission adopted § 54.642(b) of the HCF Rules, it decided not to add fair and open competitive bidding requirements to the Telecom Program Rules. *See Rural Health Care Support Mechanism*, 27 FCC Rcd 16678, 16815 (¶ 342) (2012). Instead, it added § 54.602 to the Subpart G Rules which specified that HCPS may request Telecom Program support “subject to the provisions and limitations set forth” in § 54.603 of the Telecom Program Rules, 47 C.F.R. § 54.602(a) (2013), while HCPs may request HCF support subject to the fair and open competitive bidding requirements of § 54.642(b) of the HCF Rules. *See id.* § 54.602(b).

The parties were entitled to rely on the Telecom Program Rules to give them “fair notice of conduct that is forbidden or required.” *Fox Television*, 132 S. Ct. at 2317. From the time ABS and Windstream entered into the channel partner agreement on March 15, 2011 until April 19, 2016, when Windstream terminated the agreement,¹⁷ the Telecom Program Rules did not forbid Mr. Speck from serving as a consultant for the HCPs and as a channel partner for Windstream. Nor did the Telecom Program Rules require the HCPs, ABS, Mr. Speck, or Windstream to conduct

¹⁶ *See* Windstream Appeal at 8. *See also* ABS Appeal at 7-9.

¹⁷ *See* Windstream Appeal at 5.

fair and open competitive bidding processes. In fact, the Telecommunications Access Policy Division's decision in *Hospital Networks Management, Inc.*,¹⁸ which USAC relied upon almost exclusively,¹⁹ was not issued until June 3, 2016 – 45 days after Mr. Speck ceased being a Windstream channel partner.

Because the Telecom Program Rules afforded Windstream no notice that it was required to participate in fair and open competitive bidding processes, due process would prohibit the Commission from penalizing Windstream even if the competitive bidding processes that resulted in its selection as the service provider were in fact not fair and open.²⁰ The Commission should hold that USAC cannot “withhold or claw back funding” from Windstream. Windstream Appeal at 16.

III. THERE IS NO EVIDENCE THAT THE COMPETITIVE BIDDING PROCESSES WERE NOT IN FACT FAIR AND OPEN

ABS also agrees with Windstream that the competitive bidding process that resulted in its selection as the service provider “was in fact fair and open.” *Id.* at 17. Assuming *arguendo* that USAC is correct when it claims that a process that is not fair and open is “inherently inconsistent” with the competitive bidding required by § 54.603(a) of the Telecom Program Rules,²¹ the Commission cannot find that Windstream violated that “inherent” requirement absent evidence

¹⁸ *Hospital Networks Management, Inc.*, 31 FCC Rcd 5731 (TAPD 2016). *Hospital Networks* was wrongly decided. See ABS Appeal at 31-32.

¹⁹ *Hospital Networks* was cited 15 times in the ABS Decision. See *id.* at 32 & n.143.

²⁰ “Traditional concepts of due process incorporated into administrative law preclude [the Commission] from penalizing a private party for violating a rule without first providing adequate notice of the substance of the rule.” *Satellite Broadcasting Co., Inc. v. FCC*, 824 F.2d 1 (D.C. Cir. 1987). If it fails to provide adequate notice of what is unlawful under an ambiguous rule, the Commission cannot punish a party for violating the rule. See *High Plains Wireless, L.P. v. FCC*, 276 F.3d 599, 607 (D.C. Cir. 2002) (“That the rule did not afford adequate notice [that] reflexive bidding was unlawful is itself sufficient justification for the Commission not to penalize Mercury”).

²¹ Windstream COMADs Decision at 6 (quoting *NPRM*, 32 FCC Rcd at 10633 (¶ 100)); ABS Decision at 6 (same).

showing that the alleged conflict of interest in fact “impeded fair and open competition” and caused the competitive bidding to be unfair and not open. Windstream Appeal Decision at 5; Windstream COMADs Decision at 7. There is no such evidence.

USAC found that the “nature of the relationship” between Mr. Speck and Windstream was inherently inconsistent with the competitive bidding requirement of § 54.603(a) of the Telecom Program Rules. ABS Decision at 8. After falsely suggesting that there are Rules that prohibit a consultant working on behalf of an HCP, who has a sales commission arrangement with a bidding service provider, from being involved in the preparation of the HCP’s FCC Form 465 (“Form 465”) or vendor selection process,²² USAC proceeded to claim as follows:

[T]he individual listed as the contact on the ... Forms 465 may not be affiliated with a service provider that participates in the bidding process as a bidder. That ABS executed non-exclusive agreements with other service providers and that Windstream was the only provider to ultimately tender a bid does not change the nature of the relationship between Mr. Speck and Windstream, which created a conflict of interest that undermined the competitive bidding process for all FRNs at issue - a relationship expressly prohibited by the FCC’s rules and requirements given the contact person’s *ability* to influence an HCP’s competitive bidding process by controlling the dissemination of information and potentially discouraging prospective bidders from submitting bids or excluding them from the process altogether. Therefore, based on FCC precedent, we affirm our finding that Mr. Speck’s dual role as the HCPs’ consultant and Windstream’s sales agent created a conflict of interest that impeded fair and open competition, in violation of the FCC’s competitive bidding requirements.²³

Setting aside the fact that the nature of the relationship between Mr. Speck and Windstream

²² See ABS Decision at 8. Section 54.603 of the Telecom Program Rules does not speak to consultants for HCPs, and it certainly does not prohibit such a consultant from having a sales commission arrangement with a bidding service provider, from being involved in the preparation of the HCP’s Form 465, or from taking part in the vendor selection process. See 47 C.F.R. § 54.603(a) (2017). Section 54.642(b)(2) of the HCF Rules, however, prohibits a consultant, who has a financial interest in a vendor that intends to bid, from preparing an HCP’s request for services or participating in the vendor selection process. See *id.* § 54.642(b)(2)(i), (iv).

²³ ABS Decision at 8 (footnotes omitted; emphasis in original).

was not “expressly prohibited” by the Telecom Program Rules,²⁴ the nature of the relationship that gives a contact person for an HCP the *ability* to influence the HCP’s competitive bidding process is not “inherently inconsistent” with the competitive bidding that is required under § 54.602(a) of the Telecom Program Rules. It is inherently inconsistent with competitive bidding when a contact person for an HCP *actually* discourages prospective bidders from submitting bids or excludes them from the process altogether.

Mr. Speck has denied under penalty of perjury that he did anything to discourage or prevent a potential service provider from submitting a bid, or that he did anything that could have discouraged or prevented a potential service provider from submitting a bid. *See* ABS Appeal, Ex. 2 at 7 (¶ 19). There is absolutely no evidence in the record that Mr. Speck actually influenced an HCP’s competitive bidding process by discouraging prospective bidders from submitting bids or by excluding them from *the* process altogether. The mere fact that Mr. Speck had the ability to do so is immaterial.

IV. FUNDS CANNOT BE RECOVERED FROM WINDSTREAM

USAC is not proposing to claw back funds that it “wrongfully, erroneously, or illegally paid” to Windstream. *Network Services Solutions, LLC*, 31 FCC Rcd 12238, 12285 n.334 (2016) (quoting *United States v. Wurts*, 303 U.S. 414, 415-16 (1938)). It intends to recover funds that it properly disbursed to Windstream because it subsequently determined that the “selection of Windstream as the service provider for these funding requests was not the result of a fair and open competitive bidding process, and was therefore in violation of the Commission’s requirements for

²⁴ Again, § 54.603(a) of the Telecom Program Rules does not prohibit an individual listed as the contact person on a Form 465 from having an affiliation with a service provider that is a bidder. *See* 47 C.F.R. § 54.603(a) (2017). Such a relationship would be prohibited if the Commission eventually adopts § 54.603(b)(2) of its proposed Telecom Program Rule. *See NPRM*, 32 FCC Rcd at 10676.

the Telecom Program.” Windstream COMADs Decision at 2. Because funds were disbursed to Windstream as a consequence of an alleged violation of “requirements” for the Telecom Program, USAC feels that it “must recover such funds through its normal processes.” *Id.* at 4. The fact is that the funds cannot be recovered from any of the parties absent a finding of a willful or repeated violation of a Telecom Program Rule. *See* 47 U.S.C. § 503(b)(1)(B); *Network Services*, 31 FCC Rcd at 12285 (¶ 143).

USAC can only recover funds in accordance with the Commission’s instruction that “funds disbursed from the ... [RHC] support mechanisms in violation of a ... [R]ule that implements the statute or a substantive program goal should be recovered.” Windstream COMADs Decision at 4 n.15 (quoting *Comprehensive Review of the USF Management, Administration, and Oversight*, 22 FCC Rcd 16372, 16386 (¶ 30) (2007)). *See, e.g., High-Cost Universal Service Support*, 24 FCC Rcd 6475, 6536 n.353 (2008) (“funds disbursed in violation of a ... [R]ule that implements [47 U.S.C.] § 254 or a substantive program goal will be recovered”). Here, USAC has admitted that it did not find a violation of any specific Rule,²⁵ much less one that implements § 254 of the Communications Act of 1934 (“Act”) or a substantive goal of the Telecom Program.

The Administrative Procedure Act provides, “A sanction may not be imposed ... except within jurisdiction delegated to the agency and as authorized by law.” 5 U.S.C. § 558(b). An order requiring Windstream to return funds disbursed to it by USAC because of a violation of a Rule would constitute the imposition of a sanction. *See id.* § 551(10) (defining the term “sanction” to include the “imposition of a penalty” or an “assessment of ... restitution [or] reimbursement”). And the Commission can impose a monetary sanction for a violation of a Rule only as authorized by the forfeiture provisions of § 503(b) of the Act. *See* 47 U.S.C. § 503(b).

²⁵ *See supra* note 11 and accompanying text.

The Commission cannot order Windstream to forfeit funds unless it first gives Windstream either notice and an opportunity for a hearing, *see id.* § 503(b)(3)(A), or a notice of apparent liability for forfeiture (“NALF”), *see id.* § 503(b)(4), and then determines that Windstream willfully or repeatedly failed to comply with a Rule issued by the Commission under the Act. *See id.* § 503(b)(1)(B). However, the Commission is barred from issuing a forfeiture order against Windstream for violating any Rule in connection with the competitive bidding processes in this case, because the applicable one-year statute of limitations has expired.²⁶

V. WINDSTREAM’S APPARENT VIOLATION OF § 1.17 OF THE RULES PRECLUDES A GRANT OF EQUITABLE RELIEF

Windstream requests a rule waiver, which it does not need,²⁷ and equitable relief, which it does not deserve. Windstream states its case for equitable relief as follows:

Under principles of equity, it would be entirely improper to deprive Windstream of compensation for the services it provided to UTHSC. Windstream’s payments to ABS were equal to or less than the standard residual commission rate Windstream used for channel partners at the time. Thus, while there is no evidence that Windstream paid ABS an inappropriate commission rate, the conflict alleged by USAC at most would make ABS’s receipt of such payments improper. As the parties that knowingly established a dual role in the competitive bidding process, ABS and Mr. Speck are the only parties that could have improperly profited from the commission arrangement with Windstream. The specific circumstances of this case therefore justify limiting USAC’s remedial focus to those parties.²⁸

ABS opposes Windstream’s request that “USAC’s remedial focus” be limited to ABS and Mr. Speck, because the request involves another violation of § 1.17 of the Rules,²⁹ which

²⁶ *See* 47 U.S.C. § 503(6)(B). If Windstream violated any Rule as a result of its channel partner agreement with ABS, which it did not, the violation must have occurred prior to April 19, 2016, when the agreement was terminated.

²⁷ *See* Windstream Appeal at 17 (“Alternatively, to the extent the Commission finds that ABS and Mr. Speck violated the FCC’s rules and such violation requires rescission of the funding awards to UTHSC and Windstream, waiver of the rules is appropriate”).

²⁸ *Id.* at 19.

²⁹ *See* 47 C.F.R. § 1.17 (2017).

“prohibits written or oral statements of fact that are intentionally incorrect or misleading and written statements that are made without a reasonable basis for believing that the statement is correct and not misleading.” *Amendment of § 1.17 of the Rules Concerning Truthful Statements to the Commission*, 18 FCC Rcd 4016, 4016 (¶ 2) (2003). Windstream presented the statement that ABS and Mr. Speck are the only “parties that knowingly established a dual role in the competitive bidding process” without a reasonable basis for believing that the statement was correct and not misleading. The same is apparently true with respect to the following statements of fact:

Windstream’s investigation of the relevant facts determined that the company was unaware that ABS ... and its principal, Gary Speck, provided consulting services to RHC applicants while acting as a sales agent for Windstream and other service providers.³⁰

* * * * *

In February 2016, during discussions between Windstream and UTHSC regarding a potential bid to provide service under a new contract, Windstream’s personnel responsible for managing participation in universal service programs discovered that ABS may have been acting as a consultant for UTHSC while serving as Windstream’s channel partner.³¹

* * * * *

Windstream’s supporting declaration confirms that Windstream lacked actual knowledge of the conflict at the time of the competitive bidding processes.³²

* * * * *

In all events, even if some employees within Windstream may have had constructive (or even actual) knowledge of ABS’s dual role before that time, the company was not responsible for any conflict of interest.³³

* * * * *

³⁰ Windstream Appeal at 2.

³¹ *Id.* at 4-5.

³² *Id.* at 10. The Windstream Appeal is supported by a declaration of Tim Loken, who served as Windstream’s Director – Regulatory Reporting. *See* Declaration of Tim Loken at 1 (¶ 2) (May 11, 2017) (“Loken Declaration”). The Loken Declaration originally supported Windstream’s May 17, 2017 request that USAC review the RHCD’s decision. *See* Letter from Matthew A. Brill & Elizabeth R. Park to USAC (May 11, 2017).

³³ Windstream Appeal at 10.

While USAC alleges that ABS and Mr. Speck created a conflict of interest that may have caused UTHSC to violate the competitive bidding rules, there is no evidence here ... that Windstream was responsible for any violation of the Commission's competitive bidding requirements.³⁴

The administrative record, which the Commission must review *de novo*, contains declarations under penalty of perjury, and other documentary evidence, which contradict Windstream's statements of fact. For example, such evidence shows that a Windstream District Dealer Manager, Charles Bates, and its Assistant Vice President of Indirect Sales, Michelle Kadlacek, knew prior to the signing on the channel partner agreement on March 15, 2011, that Mr. Speck would be acting as a consultant for UTHSC while serving as Windstream's channel partner. *See* ABS Appeal at 10-12.

The evidence suggests that Windstream was "responsible" for the alleged conflict of interest to the extent that, prior to March 15, 2011, Mr. Speck obtained the approval of Mr. Bates' superiors and Windstream's legal department to serve as a consultant to the HCPs and as Windstream's channel partner. *See id.* at 11-12. Had he not received Windstream's approval, Mr. Speck would never have been able to play his "dual role" as consultant to HCPs and Windstream channel partner. Windstream Appeal at 5.

Windstream had no reasonable basis for representing that its investigation, which it commenced on or around February 12, 2016,³⁵ "determined that the company was unaware" that Mr. Speck "provided consulting services to RHC applicants while acting as a sales agent for Windstream." Windstream knew of documentary evidence that showed that its Vice President – Channel Sales, James E. Pearce, its Senior Channel Manager, Zachary W. Mungeer, and its legal department were aware no later than March 30, 2015, that Mr. Speck was acting as its channel

³⁴ *Id.* at 13.

³⁵ *See* Loken Declaration at 2 (¶ 7).

partner and as a consultant for Hunt Memorial Hospital District (“Hunt”) in connection with its participation in the Telecom Program. *See* ABS Appeal at 22-23.

ABS produced its evidence with regard to the Hunt matter to refute Mr. Loken’s claims about Windstream’s 2016 “internal investigation” into the possibility that Mr. Speck had been playing a dual role. *See* Loken Declaration at 2 (¶¶ 7, 8). On December 19, 2017, Windstream responded by making the unverified claim that it “undertook a reasonable inquiry in good faith to ascertain the facts surrounding the channel partner agreement with ABS, and accurately conveyed its understanding of the relevant facts [to USAC] based on information available to the company.”

It went on to explain:

Windstream’s internal review ... was constrained by the fact that its current employees did not have any interactions with ABS/Speck at the time Windstream established the channel partner relationship. Moreover, Windstream’s interviews of relevant personnel still employed by the company did not uncover evidence of any awareness of ABS’s dual role prior to February 2016. Therefore, based on the understanding of its current personnel, including Tim Loken, Windstream’s Request for Review appropriately explained that the company’s internal inquiry failed to uncover any evidence that Windstream’s management was aware of ABS/Speck’s dual role until February 2016.³⁶

On December 29, 2017, ABS pointed out that Mr. Mungeer was apparently still available to be interviewed by Windstream – the RHCD addressed its letter decision to Mr. Mungeer on March 13, 2017³⁷ – and he certainly knew in 2015 that Mr. Speck was both a consultant for Hunt and a Windstream channel partner.³⁸ In any event, since at least December 29, 2017, Windstream has known that there is probative evidence that Mr. Speck “established [his] dual role in the competitive bidding process” with Windstream’s knowledge and consent. Windstream Appeal at

³⁶ Windstream Appeal, Ex. C at 5-6.

³⁷ *See id.*, Ex. E, Request for Review at Ex. A.

³⁸ *See* ABS Second Response at 9-10.

19. Unless it has subsequently interviewed Ms. Kadlacek, Messrs. Bates, Pearce, and Mungeer, as well as Jason Dishon and George Easley,³⁹ Windstream lacked a reasonable basis for believing that the statements it made in the Windstream Appeal in support for its request for equitable relief were correct and not misleading.

The Commission should find on the basis of the evidence before it that there is a substantial and material question of fact as to whether Windstream violated § 1.17 of the Rules by making written statements, both in its submissions to USAC and in the Windstream Appeal, that were either intentionally incorrect or misleading, or were made without a reasonable basis for believing that they were correct and not misleading. Until that question is answered, the Commission cannot grant Windstream's request for equitable relief and it certainly should not focus its remedial efforts on ABS and Mr. Speck. The evidence that Mr. Speck acted as a consultant to the HCPs and as a Windstream channel partner for over five years with Windstream's knowledge and approval shows that both ABS and Windstream believed that Mr. Speck's dual role was permissible under the Telecom Program Rules.

CONCLUSION

For all the foregoing reasons, ABS and Mr. Speck respectfully request that the Commission: (1) consolidate the ABS Appeal and the Windstream Appeal for *de novo* review; (2) hold that USAC violated due process and the *ex parte* rules; (3) hold that only § 54.603(a) of the Telecom Program Rules applied to the HCPs' competitive bidding processes; (4) reverse the ABS Decision, the Windstream Decision, and the Windstream COMADs Decision; (5) hold that § 54.603(a) of the Telecom Program Rules was not violated by the HCPs, ABS, Mr. Speck or Windstream; (6) direct USAC to make the payments owed to Windstream under the original

³⁹ *See id.*

commitment letters; and (7) issue Windstream a NALF for willfully and repeatedly violating § 1.17 of the Rules.

Respectfully submitted,

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September 4, 2018

In the Matter of)	
)	
ABS TELECOM LLC and GARY SPECK)	CC Docket No. 02-60
)	
Request for Review of Decision of)	
Universal Service Administrator)	

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SUMMARY

In March 2017, the Rural Health Care Division (“RHCD”) of the Universal Service Administrative Company denied requests for funding submitted under the Rural Health Care Telecommunications Program (“Telecom Program”) on behalf of three rural health care providers (“HCPs”). The RHCD determined that the relationship between ABS Telecom LLC (“ABS”), its Managing Partner, Gary Speck, and Windstream Communications, LLC (“Windstream”) created a conflict of interest that violated unspecified Commission rules (“Rules”) by undermining fair and open bidding to provide the services for which the HCPs sought funding. Specifically, the RHCD found that Mr. Speck’s dual role as the HCPs’ consultant and Windstream’s sales agent or “channel partner” created the conflict of interest.

ABS and Mr. Speck (collectively “ABS”) appealed the RHCD’s decision to USAC primarily on the ground that the competitive bidding provisions of § 54.603 of the Rules, which specifically apply to Telecom Program participants, neither required fair and open competitive bidding nor prohibited Mr. Speck’s dual role. Windstream also appealed, but did not serve its appeal papers (“Windstream Appeal”) on ABS. When ABS asked the RHCD for the Windstream Appeal, it was told that it could only request the document from Windstream or submit a Freedom of Information Act (FOIA) request.

ABS filed an FOIA request and finally obtained a redacted version of the Windstream Appeal in September 2017. ABS learned that Windstream had attempted to make ABS solely liable for any violation of the competitive bidding requirements by misrepresenting that it was unaware that Mr. Speck was a consultant for the HCPs. By so doing, Windstream initiated a restricted proceeding under the Commission’s *ex parte* rules.

ABS responded to the redacted version of the Windstream Appeal by producing

declarations that established not only that Windstream knew right from the beginning that Mr. Speck would be a consultant for the HCPs, but that Windstream's legal department approved of the arrangement before Windstream entered into a "channel partner agreement" with ABS in March 2011.

While the appeals were pending before USAC, the Commission confirmed that there were no fair and open competitive bidding requirements in the Telecom Program, when it issued a Notice of Proposed Rulemaking in WC Docket No. 17-310 ("Docket 17-310") that called for the adoption of such requirements. In particular, the Commission proposed to amend § 54.603 to require fair and open competitive bidding in the Telecom Program, and to prohibit a person having a sales commission arrangement with a bidding service provider from serving as a consultant or a point of contact for an HCP. Nevertheless, USAC proceeded to issue three separate decisions on the same day upholding its RHCD. Although all three decisions included identical findings and conclusions, USAC refused to give ABS copies of the decisions on the Windstream Appeal and a companion appeal.

USAC admitted that the HCPs' funding requests were not denied based on a violation of any Rule, but rather were based on a violation of the fair and open competitive bidding requirements which USAC claimed applied to Telecom Program participants. Although it also conceded that such requirements have yet to be codified in Telecom Program Rules, USAC claimed that in Docket 17-310 the Commission was merely codifying the fair and open standard for the Telecom Program.

USAC effectively held that ABS engaged in conduct that would violate a Telecom Program Rule if committed *after* the Commission adopts a rule that is the same or substantially similar to the § 54.603 that it is currently proposing. ABS is challenging USAC's premature enforcement

of the Commission's proposed rule. Because existing § 54.603 of the Telecom Program Rules is a legislative rule that cannot be materially changed absent a notice-and-comment rulemaking that comports with the Administrative Procedure Act ("APA"), and since the Commission declined to add fair and open competitive bidding requirements to the Telecom Program Rules in a 2012 rulemaking decision, the enforcement of those requirements now would circumvent and undermine the notice-and-comments requirements of the APA.

Moreover, because the Commission can only enforce its proposed fair and open competitive bidding requirements prospectively if and when they have been adopted and become effective, USAC certainly cannot enforce fair and open competitive requirements against Telecom Program participants now. For that reason, the Commission should reverse the USAC Decision.

ABS asks the Commission to overrule precedent that encouraged USAC to withhold documentary evidence and its decisions in the adjudication below under the guise of FOIA. Congress never authorized the Commission either to establish USAC or to subdelegate authority to USAC. USAC cannot invoke FOIA because it is not a federal agency.

The Commission is asked to remedy the USAC's violations of ABS' due process rights, its refusal to abide by the *ex parte* rules, and its failure to address evidence that Windstream violated § 1.17 of the Rules by making false statements in the Windstream Appeal without a reasonable basis for believing that the statements were correct and not misleading.

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

In the Matter of)	
)	
ABS TELECOM LLC and GARY SPECK)	CC Docket No. 02-60
)	
Request for Review of Decision of)	
Universal Service Administrator)	

REQUEST FOR REVIEW

ABS Telecom LLC (“ABS”) and its Managing Partner, Gary Speck, by their attorney and pursuant to §§ 54.719(b) and 54.720(a) of the Commission’s rules (“Rules”), hereby request that the Commission review and reverse the decision of the Universal Service Administrative Company (“USAC”)¹ denying the appeal filed by ABS and Mr. Speck (collectively “ABS”) with respect to a decision of USAC’s Rural Health Care Division (“RHCD”) that denied requests for funding submitted under the Rural Health Care Telecommunications Program (“Telecom Program”) on behalf of rural health care providers (“HCPs”): The Burke Center – West Austin Street (“Burke”), Trinity Valley Community College (“Trinity”), and The University of Texas Health Sciences Center at Tyler (“UTHSCT”) on behalf of the East Texas Interactive Healthcare Network (“ETIHN”) - Andrews Center (“Andrews”).²

STANDING

The RHCD initially determined that the relationship between Mr. Speck and Windstream Communications, LLC (“Windstream”) created a conflict of interest that violated the Rules by

¹ See Letter from USAC to Russell D. Lukas & Jeffrey A. Mitchell (June 29, 2018) (“USAC Decision”). The USAC Decision is attached as Exhibit 1.

² See Email from RHC-Assist to Gary Speck (Mar. 13, 2017) (“Denial Notice”); Letter from Craig Davis to Darlene Flournoy & Zachery Mungeer (Mar. 13, 2017) (“Further Explanation”).

undermining fair and open bidding to provide the services for which the HCPs sought funding.³ The RHCD's finding that ABS was involved in conduct that violated the Rules severely damaged ABS' professional reputation in northeast Texas where it does business.⁴ That reputational injury made ABS an aggrieved party with standing to ask USAC to review the RHCD's decision. *See* 47 C.F.R. § 54.719(a) (2017).

Unsurprisingly, considering that the USAC Decision was apparently issued by the RHCD,⁵ USAC found that Mr. Speck's "dual role" as a consultant for the HCPs and as a "channel partner" for Windstream created a conflict of interest that tainted the competitive bidding that resulted in the selection of Windstream as the HCPs' service provider. USAC Decision at 9. USAC denied the ABS Appeal, specifically because it found that the competitive bidding "was not fair and open, in violation of the FCC's rules and requirements." *Id.* USAC's action made ABS an "aggrieved" party with standing to seek Commission review. 47 C.F.R. § 54.719(b) (2017).

The infliction of reputational injury in a USAC enforcement proceeding justifies the invocation of procedural safeguards under the Due Process Clause of the Fifth Amendment. *See FCC v. Fox Television Stations, Inc.*, 132 S. Ct. 2307, 2318-19 (2012). The fact that ABS suffered such injury at the hands of USAC in this proceeding affords it standing to seek relief from USAC's due process violations.

³ *See* Letter from Russell D. Lukas & Jeffrey A. Mitchell to USAC at 1-2 (May 12, 2017) ("ABS Appeal"). The ABS Appeal is incorporated herein by this reference.

⁴ *See* Declaration of Gary H. Speck at 8 (¶ 23) (May 10, 2017). Mr. Speck's declaration is attached hereto as Exhibit 2. It was submitted to USAC as Attachment 3 to the ABS Appeal.

⁵ The USAC Decision was in the form of a letter under the RHCD's letterhead. *See* Ex. 1 at 1. It was transmitted to undersigned counsel by Ms. Lisa Pilgrim, a Senior Program Analyst of Program Risk and Compliance for the Rural Health Care Program ("RHC Program"). Ms. Pilgrim described the USAC Decision as the "Rural Health Care Division's decision." Email from Lisa Pilgrim to Russell D. Lukas & Jeffrey A. Mitchell at 1 (June 29, 2018).

QUESTIONS PRESENTED FOR REVIEW

ABS presents the following questions of law for *de novo* review by the Commission pursuant to § 54.723(b) of the Rules:

- (1) Whether the HCPs and ABS were only subject to the competitive bidding and certification requirements applicable to participants in the Telecom Program under § 54.603 of the Rules, *see* USAC Decision at 5;
- (2) Whether USAC can deny requests for funding under the Telecom Program for conduct that allegedly violated “fair and open competitive bidding requirements,” but did not violate the competitive bidding requirements of § 54.603 of the Rules that apply to participants in the Telecom Program, *id.* at 5;
- (3) Whether USAC can withhold documents or documentary evidence pursuant to the Freedom of Information Act (“FOIA”), when it is not a federal agency;
- (4) Whether USAC’s review of the RHCD’s denial of the HCPs’ funding requests constituted a contested “licensing” case under the Administrative Procedure Act (“APA”), *see* 5 U.S.C. § 551(8), or a “restricted proceeding” under § 1.1208 of the Rules, 47 C.F.R. § 1.1208 (2017); and
- (5) Whether USAC deprived ABS of its due process rights to have access to documentary evidence in the administrative record and to participate as a party to an adjudicatory proceeding in which its protected interests were at stake.

STATEMENT OF MATERIAL FACTS

A. Regulatory Background

The Universal Service Fund (“USF” or “Fund”) supports several universal service support mechanisms that are regulated under different subparts of Part 54 of the Rules. These include Universal Service Support for Schools and Libraries (“E-rate Program”), which is governed by Subpart F of Part 54.⁶ Universal Service Support for Health Care Providers (“RHC Program”) is subject to Subpart G.⁷ The RHC Program includes the Telecom Program and the Healthcare Connect Fund (“HCF”). Rule §§ 54.600 through 54.602 and §§ 54.671 through 54.680 apply to

⁶ *See* 47 C.F.R. §§ 54.500-54.523 (2017) (“E-rate Rules”).

⁷ *See id.* §§ 54.600-54.680.

both the Telecom Program and the HCF. But §§ 54.603 through 54.625 only apply to the Telecom Program,⁸ and §§ 54.630 through 54.649 govern only the HCF.⁹

In 1997, the Commission created the E-rate Program and the RHC Program as part of its implementation of the Telecommunications Act of 1996 (“1996 Act”). *See Federal-State Board on Universal Service*, 12 FCC Rcd 8776, 8780 (1997) (“*First USF R&O*”).¹⁰ The Subpart G Rules that the Commission adopted in 1997 have essentially become the Telecom Program Rules of today.¹¹ The Commission promulgated a single Subpart G Rule that addressed competitive bidding. The initial version of § 54.603(a) of the Telecom Program Rules provided as follows:

Competitive bidding requirement. To select the telecommunications carriers that will provide services eligible for universal service support to it under this subpart [G], each eligible [HCP] shall participate in a competitive bidding process pursuant to the requirements established in this subpart and any additional and applicable state, local, or other procurement requirements.¹²

The Commission also adopted a competitive bidding requirement for the E-rate Program. The 1997 version of § 54.504(a) of the E-rate Rules was as perfunctory as § 54.603(a) of the Telecom Rules. It read:

⁸ *See id.* §§ 54.603-54.625 (“Telecom Program Rules”); *see id.* § 54.602(a) (“Rural [HCPs] may request support for the difference, if any, between the urban and rural rates for telecommunications services, subject to the provisions and limitations set forth in [§§] 54.600 through 54.625 and [§§] 54.671 through 54.680. This support is referred to as the ‘[Telecom] Program’”).

⁹ *See id.* §§ 54.630-54.649 (“HCF Rules”); *see id.* § 54.602(b) (“Eligible [HCPs] may request support for eligible services, equipment, and infrastructure, subject to the provisions and limitations set forth in [§§] 54.600 through 54.602 and [§§] 54.630 through 54.680. This support is referred to as the “[HCF]”).

¹⁰ The *First USF R&O* was one of the “trilogy of actions” that the Commission took to achieve the 1996 Act’s goal of establishing a “pro-competitive, de-regulatory national policy framework designed to accelerate rapidly private sector deployment of advanced telecommunications and information technologies and services to all Americans by opening up all telecommunications markets to competition.” 12 FCC Rcd at 8781 (quoting H.R. Rep. No. 104-458, at 1 (1996)). Consistent with Congress’ “pro-competitive, de-regulatory” goal, the Commission fostered competition from non-telecommunications carriers and encouraged them to provide services to schools and libraries and HCPs. *See id.* at 8794 (¶ 29), 8797 (¶ 37).

¹¹ Compare 47 C.F.R. §§ 54.601-54.623 (1997) with 47 C.F.R. §§ 54.603-54.625 (2017). *See also First USF R&O*, 12 FCC Rcd at 9345-53 (§§ 54.601-54.623).

¹² 47 C.F.R. § 603(a) (1997). *See First USF R&O*, 12 FCC Rcd at 9347 (§ 54.603(a)).

Competitive bidding requirement. All eligible schools, libraries, and consortia including those entities shall participate in a competitive bidding process, pursuant to the requirements established in this subpart [F], but this requirement shall not preempt state or local competitive bidding requirements.¹³

The *First USF R&O* included the Commission's determination that "a competitive bidding requirement was necessary to 'help minimize the support required by ensuring that rural HCPs are aware of cost-effective alternatives' and 'ensure that the [USF] fund is used wisely and efficiently.'" *Rural Health Care Support Mechanism*, 27 FCC Rcd 16678, 16778 (¶ 229) (2012) ("*RHC Reform R&O*") (footnotes and citations omitted). Apparently, the Telecom Program's competitive bidding rule was adopted in part "to encourage competitive neutrality and foster competition." *First USF R&O*, 12 FCC Rcd at 9134 (¶ 689). Consistent with the deregulatory policy of the 1996 Act, the Commission placed the burden of complying with the competitive bidding rule entirely on HCPs.¹⁴

The competitive bidding and certification provisions of § 54.603 of the Telecom Program that the Commission adopted in 1997 have remained virtually unchanged until today.¹⁵ Not so with respect to the E-rate Program's competitive bidding rule.

The notion that § 54.504 and § 54.511 of the E-rate Rules were intended to promote "a fair and open competitive bidding process" first surfaced in May 2000. *MasterMind Internet Services, Inc.*, 16 FCC Rcd 4028, 4029 (¶ 2) (2000). However, it took the Commission 10 years to amend § 54.503 "to codify the existing requirement that the E-rate competitive bidding process be fair and open." *Schools and Libraries Universal Service Support Mechanism*, 25 FCC Rcd 18762,

¹³ 47 C.F.R. § 54.504(a) (1997). See *First USF R&O*, 12 FCC Rcd 9338 (§ 54.504(a)).

¹⁴ See 47 C.F.R. § 54.603(a), (b)(1), (b)(4) (1997).

¹⁵ Compare *id.* § 54.603 with 47 C.F.R. § 54.603 (2017). In 2003, the FCC amended § 54.603 by replacing the term "Rural Health Care Corporation" in subsections (b)(1), (b)(2), (b)(3), (b)(4), and (b)(5) with "Rural Health Care Division." *Rural Health Care Support Mechanism*, 18 FCC Rcd 24566, 24586 (§ 54.603) (2003) ("*2003 RHC R&O*").

18798 (¶ 85) (2010) (“*Sixth E-rate R&O*”).¹⁶ In order to “improve safeguards against waste, fraud and abuse,”¹⁷ the Commission promulgated a new § 54.503 of the E-rate Rules that spelled out the “types of conduct [that] are necessary to satisfy a fair and open competitive bidding requirement.” *Id.* at 18799 (¶ 86). *See id.* at 18816-20 (§ 54.503). New § 54.503(a) provided in pertinent part as follows:

... All entities participating in the schools and libraries universal service support program must conduct a fair and open competitive bidding process, consistent with all requirements set forth in this subpart.

(Note: The following is an illustrative list of activities or behaviors that would not result in a fair and open competitive bidding process: the applicant for supported services has a relationship with a service provider that would unfairly influence the outcome of a competition or would furnish the service provider with inside information; a service provider representative is listed as the FCC Form 470 contact person and allows that service provider to participate in the competitive bidding process; [and] an applicant employee with a role in the service provider selection process also has an ownership interest in the service provider seeking to participate in the competitive bidding process)¹⁸

The Commission’s “comprehensive reform” of the RHC Program in December 2012¹⁹ included several “measures to help prevent waste, fraud and abuse.” *RHC Reform R&O*, 27 FCC Rcd at 16698 (¶ 41). Among such measures were the sweeping competitive bidding requirements of § 54.642 of the HCF Rules, which subjected “eligible service providers”²⁰ or “eligible

¹⁶ “Although numerous Commission orders already make clear that, to comply with the Commission’s competitive bidding process requirements, applicants and service providers must conduct and participate in a fair and open competitive bidding process, we find that codification of this requirement is warranted.” *Sixth E-rate R&O*, 25 FCC Rcd at 18798-99 (¶ 85). To support that claim, the Commission only cited *Ysleta Independent School District*, 18 FCC Rcd 26406 (2003). *See id.* at 18799 n.244. In *Ysleta*, the Commission concluded that the type of procurement practiced by the schools violated § 54.504(a) of the E-rate Rules, because it effectively eliminated competitive bidding for the products and services eligible for discounts under the E-rate Program.

¹⁷ *Sixth E-rate R&O*, 25 FCC Rcd at 18764 (¶ 6).

¹⁸ *Id.* at 18816 (§ 54.503(a)).

¹⁹ *RHC Reform R&O*, 27 FCC Rcd at 16683 (¶ 10).

²⁰ *Id.* at 16765 (¶ 194).

vendors”²¹ to competitive bidding requirements for the first time.²² In particular, § 54.642(b) sets forth the requirements for a “fair and open” competitive bidding process, which included:

- All entities participating in the HCF must conduct a fair and open competitive bidding process, consistent with all applicable requirements. *See* 47 C.F.R. § 54.642(b)(1) (2017).
- Vendors who intend to bid to provide supported services, equipment, or facilities to a HCP may not simultaneously help the HCP choose a winning bid. *See id.* § 54.642(b)(2).
- Any vendor who submits a bid, and any individual or entity that has a financial interest in such a vendor, is prohibited from: preparing, signing or submitting an applicant’s request for services, *see id.* § 54.642(b)(2)(i); serving as the point of contact on behalf of the applicant, *see id.* § 54.642(b)(2)(ii); being involved in setting bid evaluation criteria, *see id.* § 54.642(b)(2)(iii); or participating in the bid evaluation or vendor selection process. *See id.* § 54.642(b)(2)(iv).
- All potential bidders must have access to the same information and must be treated in the same manner. *See id.* § 54.642(b)(3).

The Commission issued its *RHC Reform R&O* more than two years after it had reformed the E-rate Program by its *Sixth E-rate R&O*. Although it considered the safeguards it adopted for the E-rate Program,²³ the Commission adopted a “fair and open” competitive bidding rule for the HCF that was substantially different from § 54.503(a) of the E-rate Rules.²⁴

The *RHC Reform R&O* promulgated many changes to the Telecom Program Rules. *See* 27 FCC Rcd at 16867-72 (§§ 54.603-54.625). With respect to § 54.603 of the Telecom Program Rules, the Commission changed its heading from “Competitive bidding” to “Competitive bidding and certification requirements.”²⁵ It amended the competitive bidding provision of § 54.603(a) by

²¹ *See id.* at 16880 (§ 54.640(a)).

²² *See id.* at 16881 (§ 54.642(b)(1)). *See also id.* at 16778 (¶ 230) (“all entities participating in the [HCF] must conduct a fair and open competitive bidding process prior to submitting a request for funding”).

²³ *See id.* at 16779 nn. 590-594, 596.

²⁴ *Compare* 47 C.F.R. § 54.642(b) (2017) *with id.* § 54.503(a).

²⁵ *Compare RHC Reform R&O*, 27 FCC Rcd at 16867 (§ 54.603) *with First USF R&O*, 12 FCC Rcd at

substituting “the Telecommunications Program” and “this section” for “this subpart.”²⁶ The Commission also changed the heading of § 54.603(b) from “Posting of requests for service” to “Posting of FCC Form 465” (“Form 465”)²⁷ And it amended § 54.603(b)(1) to read:

An eligible [HCP] seeking to receive telecommunications services eligible for universal service support under the [Telecom] Program shall submit a completed ... Form 465 to the Administrator. [The] Form 465 shall be signed by the person authorized to order telecommunications services for the [HCP] and shall include, at a minimum, that person’s certification under oath that:

- (i) The requester is a public or non-profit entity that falls within one of the seven categories set forth in the definition of [HCP], listed in §54.600(a);
- (ii) The requester is physically located in a rural area;
- (iii) [Reserved]²⁸

Conspicuously missing from the changes to the Telecom Program Rules promulgated by the *RHC Reform R&O* was a rule comparable to the “fair and open” competitive bidding rule that the Commission adopted for the HCF. In a footnote to the *RHC Reform Order*, the Commission stated that it “expect[ed] to address potential reforms to the [Telecom] Program at a future date.”²⁹ In the very brief section on Telecom Program reform, the Commission explained:

For the time being, we maintain the current [Telecom] Program, which funds the difference between the rural rate for telecommunications services and the rate paid for comparable services in urban areas.... [W]e expect significant migration of HCPs out of the [Telecom] Program and into the [HCF] over time.

... As the new [HCF] is implemented, we expect to consider whether the [Telecom] Program remains necessary, and if so whether reforms to the program are appropriate to ensure that any continuing support under that program is provided in

9347 (§ 54.603).

²⁶ Compare *RHC Reform R&O*, 27 FCC Rcd at 16867 (§ 54.603(a)) with *First USF R&O*, 12 FCC Rcd at 9347 (§ 54.603(a)).

²⁷ Compare *RHC Reform R&O*, 27 FCC Rcd at 16867 (§ 54.603(b)) with *First USF R&O*, 12 FCC Rcd at 9347 (§ 54.603(b)).

²⁸ *RHC Reform R&O*, 27 FCC Rcd at 16867 (§ 54.603(b)(1)).

²⁹ *Id.* at 16751 n.433. See *id.* at 16807 n.746 (“We decline to extend this policy [relating to site and service substitution] to the [Telecom] Program in this proceeding, which did not propose such policy changes for that program. We may consider adopting such changes for that program in the future, if they work well in the [HCF]”).

a cost-effective manner.... Such reforms could include changes to ensure subsidies provided under the program are set at appropriate levels, to provide greater incentives for cost-efficient purchasing by program participants, and to reduce the administrative costs of the program, both to participants and to USAC.

... In the meantime, the current [Telecom] Program rules and procedures will continue to apply. In addition, because we view our health care universal service programs as accomplishing the same overarching goals, we make the performance goals and measures adopted in this Order applicable in the [Telecom] Program as well as to the [HCF].³⁰

Finally, in its *RHC Reform R&O*, the Commission erected a regulatory framework that shielded the Telecom Program Rules from its new HCF Rules. It adopted a new § 54.602, which provides in part as follows:

(a) *Telecommunications Program*. Rural [HCPs] may request support for the difference, if any, between the urban and rural rates for telecommunications services, subject to the provisions and limitations set forth in [§§] 54.600 through 54.625 and [§§] 54.671 through 54.680. This support is referred to as the “Telecommunications Program.”

(b) *Healthcare Connect Fund*. Eligible [HCPs] may request support for eligible services, equipment, and infrastructure, subject to the provisions and limitations set forth in [§§] 54.600 through 54.602 and [§§] 54.630 through 54.680. This support is referred to as the “Healthcare Connect Fund.”³¹

B. The HCPs

The Northeast Texas Consortium (“NETnet”) obtains broadband network facilities for its members to deliver video-conferencing capabilities for training, educational, and healthcare delivery purposes as well as data capabilities for information access and resource sharing.³² NETnet supports ETIHN, which provides connectivity between medical healthcare centers and healthcare education institutions in East Texas, including Burke, Trinity, and Andrews.³³

³⁰ *Id.* at 16815 (¶ 342).

³¹ *RHC Reform R&O*, 27 FCC Rcd at 16886 (§ 54.602); 47 C.F.R. § 54.602 (2013).

³² See UTHSCT, Request for Review, CC Docket No. 02-60, at 3 (May 12, 2017) (“UTHSCT Request”).

³³ See *id.* ETIHN described itself as a voluntary collaboration of seven HCPs that serve 50 rural northeast Texas counties. See Ex. 2 at (¶ 5). Trinity, Burke, Andrews, and UTHSCT were members of ETIHN. See

UTHSCT serves as the fiscal agent for and provides facilities and staffing for NETnet administration.³⁴ ABS' main contacts with ETIHN were with its Director, Dr. Mickey Slimp, and its Coordinator, Darlene Flournoy.³⁵

In 2010, ETIHN needed telecommunications facilities and services to deploy a network linking HCPs in northeast Texas.³⁶ It had been searching unsuccessfully for telecommunications service providers willing to provide the point-to-point data services that the HCPs needed.³⁷ The problem was that the HCPs operated in sparsely-populated, widely-dispersed areas that would be too expensive and extremely difficult to serve.³⁸

ABS advised ETIHN that the HCPs should consider applying for USF support under the Telecom Program.³⁹ ABS was subsequently retained to provide consulting services to ETIHN and the HCPs that would include: (a) identification of potential service providers; (b) general advice and guidance about the Telecom Program; (c) formulation of requests for proposals; (d) preparation and certification of the necessary Form 465s; and (e) assistance in the bid evaluation process.⁴⁰

C. The Channel Partner Agreement

Charles Bates was employed as a "Channel Sales Manager" for Windstream from September 2010 through December 2014.⁴¹ In February 2011, Mr. Bates called Mr. Speck to

id.

³⁴ See UTHSCT Request at 4.

³⁵ See Ex. 2 at 2 (¶ 5).

³⁶ See *id.* (¶ 6).

³⁷ See *id.* at 3 (¶ 8).

³⁸ See *id.* at 2-4 (¶¶ 6-8).

³⁹ See *id.* at 4 (¶ 9).

⁴⁰ See *id.*

⁴¹ See Declaration of Charles Bates at 1 (¶ 1) (Sept. 12, 2017). Mr. Bates' declaration is attached as Exhibit

interest him in becoming a Windstream “channel partner.”⁴² In the course of their conversation, Mr. Speck mentioned a potential project for ETIHN that would involve providing telecommunications facilities for the HCPs.⁴³ Mr. Speck asked Mr. Bates if Windstream would be interested in bidding on the project under the Telecom Program.⁴⁴

In subsequent conversations and emails, Mr. Speck informed Mr. Bates that: (1) ABS would act as a consultant for the HCPs; (2) the HCPs would be seeking funding under the Telecom Program; (3) he would be filing documents, including the Forms 465, on behalf of the HCPs; (4) in the open bidding process, he would be accepting bids from any service provider interested in participating in the ETIHN project; and (5) Windstream would not win the business unless it would provide the service at the lowest price.⁴⁵

Mr. Speck asked Mr. Bates to obtain the approval of his superiors and Windstream’s legal department to move forward with the ETIHN project through Windstream’s Channel Program.⁴⁶

In February 2011, Mr. Bates spoke with his supervisor Michelle Kadlacek, Windstream’s Assistant Vice President (“AVP”) of Indirect Sales, about the ETIHN project. Mr. Bates and Ms.

3. It was submitted to USAC on September 21, 2017. *See* Letter from Russell D. Lukas to USAC at Ex. 3 (Sept. 21, 2017) (“ABS Response”). In an email sent to Mr. Speck on March 1, 2011, Mr. Bates identified himself as Windstream’s “District Dealer Manager.” *See* Declaration of Gary H. Speck, Ex. 4 at 7 (Attach. A) (Sept. 20, 2017). Mr. Speck’s September 20, 2017 declaration is attached as Exhibit 4. It was submitted to USAC as Exhibit 4 to the ABS Response.

⁴² *See* ABS Response, Ex. 3 at 1 (¶ 1); Ex. 4 at 2 (¶ 5). Attached hereto as Exhibit 5 is a copy of the Dealer Agreement that Windstream and ABS entered into on or about March 15, 2011. *See* Windstream, Request for Review, WC Docket No. 02-60, at 4 (Aug. 23, 2018) (“Windstream Request”). Windstream refers to the Dealer Agreement as a “channel partner agreement.” *Id.* It appears that ABS was initially called by Mr. Bates. *See* Ex. 5 at 15.

⁴³ *See* ABS Response, Ex. 3 at 1-2 (¶ 3); Ex. 4 at 2 (¶ 5).

⁴⁴ *See id.*, Ex. 3 at 2 (¶ 4); Ex. 4 at 2 (¶ 5).

⁴⁵ *See id.*, Ex. 3 at 2 (¶ 4); Ex. 4 at 2 (¶¶ 5, 6).

⁴⁶ *See id.*, Ex. 3 at 2 (¶ 4); Ex. 4 at 2 (¶ 6). On February 28, 2011, Mr. Speck sent an email to Mr. Bates with the subject line, “Charles as the [a]ttorney completes the review we have a project that needs attention.” *Id.*, Ex. 4 at 7 (Attach. A).

Kadlacek contacted an attorney in Windstream's legal department, who was designated to handle USAC issues, and explained the ETIHN opportunity and ABS' involvement. They informed Windstream's attorney that ABS would be serving as a consultant for the HCPs and, in that capacity, would be filing the documents with USAC on behalf of the HCPs.⁴⁷

After responding to questions from Windstream's legal department, Mr. Bates and Ms. Kadlacek were given their authorization to proceed to bid on the ETIHN project.⁴⁸ In early March 2011, Mr. Bates informed Mr. Speck that Windstream's legal department had approved the project.⁴⁹

On or about March 7, 2011, Mr. Speck signed Windstream's Dealer Agreement, or channel partner agreement, on behalf of ABS. On March 8, 2011, he signed Exhibits A and B to the agreement; he acknowledged that he read and understood Windstream's slamming prevention policies;⁵⁰ and he signed Windstream's "Vendor Intake Form."⁵¹

Windstream entered into the channel partner agreement with ABS on or about March 15, 2011.⁵² When it entered into the agreement, Windstream was aware that ABS was a consultant for the HCPs.⁵³

D. The Competitive Bidding

On or about May 5, 2011, Mr. Bates was informed by Mr. Speck that he had filed the initial

⁴⁷ See *id.*, Ex. 3 at 2-3 (¶ 5).

⁴⁸ See *id.* at 3 (¶ 5).

⁴⁹ See *id.*, Ex. 4 at 2 (¶ 7).

⁵⁰ "Slamming" is the illegal practice of switching a consumer's traditional wireline telephone company for local, local toll, or long distance service without permission.

⁵¹ See *infra* Ex. 5 at 7-10, 12, 14.

⁵² See ABS Response, Ex. 4 at 2 (¶ 7); Windstream Appeal at 4.

⁵³ See ABS Response, Ex. 3 at 2-3 (¶¶ 5, 6), 4 (¶ 10); Ex. 4 at 2 (¶¶ 6, 7).

Form 465 for the ETIHN project. Mr. Speck gave Mr. Bates the HCP and Form 465 numbers so that Windstream could confirm that the open bid window had opened and could track the Form 465.⁵⁴

In June 2011, Windstream's legal department began direct contract negotiations with Dr. Slimp, ETIHN's Director, and the attorneys representing the HCPs. The first set of the contracts for the HCPs were signed nine months later on March 19, 2012.⁵⁵

On December 13, 2011, Mr. Bates and Ms. Kadlacek traveled to Tyler, Texas, to meet with Dr. Slimp and Mr. Speck. During that meeting, Mr. Speck informed Dr. Slimp that ABS would be compensated by Windstream as its channel partner.⁵⁶

Mr. Speck notified ABS' Windstream channel manager (initially Mr. Bates, and subsequently Zachary Mungeer) by telephone or email when he submitted a Form 465 for one of the HCPs so that Windstream could obtain the form from the RHCD website and consider bidding on the project.⁵⁷ The channel manager was directly informed that ABS was initiating the open bid period with the Form 465 in its role as consultant for the HCP.⁵⁸

Prior to each competitive bid process, ABS and the HCP solicited interest in bidding from all carriers that had the capacity to provide the services that the HCP was considering to determine if there was a viable service solution.⁵⁹ These carriers included, *inter alia*, ACC Business, Zayo

⁵⁴ See *id.*, Ex. 3 at 3 (¶ 7); Ex. 4 at 3 (¶ 10).

⁵⁵ See *id.*, Ex. 3 at 3 (¶ 8); Ex. 4 at 4 (¶ 12).

⁵⁶ See *id.*, Ex. 3 at 3 (¶ 9); Ex. 4 at 3 (¶ 11).

⁵⁷ In December 2014, Windstream's Senior Channel Manager, Zachary Mungeer, took over from Mr. Bates. See *id.*, Ex. 4 at 2 (¶ 5), 12 (Attach. E).

⁵⁸ See *id.*, Ex. 3 at 4 (¶ 11); Ex. 4 at 4 (¶ 13).

⁵⁹ See *id.*, Ex. 2 at 7 (¶ 18).

Group, Nitel, Suddenlink Business, and Windstream.⁶⁰

ABS had non-exclusive agreements with all the telecommunications carriers, co-ops, and cable companies that served northeast Texas, under which ABS would receive commissions for identifying and bringing a new business customer to the carriers.⁶¹ ABS did not stand to benefit from the selection of any particular service provider, since it would be compensated by any service provider selected by the HCP.⁶²

During each competitive bid process, ABS provided exactly the same information to each potential service provider, and it responded in a timely manner to any follow-up questions from potential bidders.⁶³ ABS never did anything to discourage or prevent a potential service provider from submitting a bid. Nor did it do anything that could have discouraged or prevented a service provider from bidding.⁶⁴

ABS was not called upon to take part in a bid evaluation and selection process, because Windstream was the only service provider that submitted bids in response to the Forms 465 for the Burke, Trinity, and Andrews projects.⁶⁵ If a competing service provider had tendered a lower bid than Windstream's, such a bidder would have been selected by the HCP.⁶⁶

E. The RHCD Decision

On March 13, 2017, the RHCD emailed the Denial Notice to Burke, Trinity, and UTHSCT

⁶⁰ *See id.*

⁶¹ *See id.* at 5 (¶ 11).

⁶² *See id.*

⁶³ *See id.* at 7 (¶ 19).

⁶⁴ *See id.*

⁶⁵ *See id.*, Ex. 4 at 5 (¶ 16); UTHSCT Request at 6. A number of prospective bidders responded to the Forms 465 submitted by ABS by requesting additional information regarding the projects. *See id.* at 4. However, only Windstream ended up submitting bids. *See id.* at 6.

⁶⁶ *See* Ex. 2 at 7 (¶ 20).

informing them that USAC was unable to provide support, because the HCPs' selection of Windstream as their service provider was not the result of a "fair and open competitive bidding process" in violation of the Rules.⁶⁷ For a "more detailed explanation of the reason for the denial" of funding, the RHCD referred the parties to the Further Explanation, which was attached to the Denial Notice.⁶⁸

The Further Explanation was an 18-page letter from Mr. Craig Davis of the RHCD to Ms. Flournoy and Mr. Mungeer.⁶⁹ The Further Explanation included the following findings and conclusions:

FCC rules require HCPs to competitively bid the requested services and select the most cost-effective method of providing the requested service. The FCC also requires that the competitive bidding process be fair and open, and that it not be compromised because of improper conduct by the HCP, service provider, or both parties. This means that all potential bidders and service providers must have access to the same information and must be treated in the same manner throughout the procurement process. In the instant matter, ... [the RHCD] concludes that the relationship between Windstream and Mr. Gary Speck, the party who both filed the ... Forms 465 on behalf of the HCPs and whose employer (i.e, ABS ...) was listed as a vendor on at least one of the HCPs' service agreements with Windstream, created a conflict of interest that undermined the competitive bidding process for all FRNs at issue in violation of the FCC's rules.^[70]

* * * * *

Based on the record and application of FCC precedent, [the RHCD] finds that Mr. Speck's role as the contact person listed on the ... Forms 465 and affiliation with Windstream undermined fair and open competitive bidding for all FRNs.... Indeed, it is precisely this type of relationship between an HCP's contact person and a service provider that is prohibited by the FCC's rules given the contact person's ability to influence an HCP's competitive bidding process by controlling the dissemination of information and potentially discouraging prospective bidders from submitting bids or excluding them from the process altogether. Accordingly, [the RHCD] deems the ... Forms 465 defective and denies all funding requests arising

⁶⁷ ABS Appeal, Attach. 1 at 1. The Denial Notice was also emailed to ABS, Mr. Speck, CFT Filings LLC ("CFT"), and Windstream at e-rate@windstream.com. *See id.*

⁶⁸ *Id.*

⁶⁹ *See id.*, Attach. 2.

⁷⁰ *Id.*, Attach. 2 at 6 (footnotes omitted).

from these forms⁷¹

F. The Appeal Proceeding

The RHCD disclosed that the record upon which it based its finding that Mr. Speck engaged in prohibited conduct consisted of “information and documentation” that it had been provided.”⁷² Seven documents were cited in the Further Explanation.⁷³ On April 27, 2017, the undersigned asked the RHCD for copies of the documents cited in the Further Explanation, as well as any other documents that were provided by Windstream in response to requests for information about its costs and how it determined urban and rural rates.⁷⁴ Counsel also made the following request:

Whether or not the HCPs join our clients in appealing USAC’s decision, the appeal process will constitute an informal agency adjudication. *See Universal Service Contribution Methodology*, 29 FCC Rcd 9715, 9719 (¶ 12) (2014). Such a proceeding does not appear to be among those listed as exempt in 47 C.F.R. § 1.1204(b) or as permit-but-disclose in 47 C.F.R. § 1.1206(a). Accordingly, the appeal process may be treated as a restricted proceeding in which *ex parte* presentations are prohibited. *See* 47 C.F.R. § 1.1208(a). Accordingly, by copies of this letter, we are requesting that the HCPs and Windstream serve us with a copy of any appeal that they may file in this case, as well as any other written presentation that is directed to the merits or outcome of the appeal that our clients will file.⁷⁵

On May 9, 2017, the RHCD informed the undersigned that it was “unable to share this information with you as a third party.”⁷⁶ It stated that the documents would have to be obtained either from Windstream or pursuant to a Freedom of Information Act (“FOIA”) request.

ABS appealed the RHCD’s decision on May 12, 2017, and argued that the RHCD was dead

⁷¹ *Id.* at 7 (footnote omitted).

⁷² *Id.* at 5, 7.

⁷³ *See* Russell D. Lukas, Application for Review of Freedom of Information Action, FOIA Control No. 2017-000672, at 5 (Table 1) (Oct. 31, 2017) (“FOIA Appeal”). The FOIA Appeal is incorporated herein by this reference.

⁷⁴ *See id.*, Ex. 3 at 2-3.

⁷⁵ *Id.* at 3.

⁷⁶ *Id.* at 4.

wrong when it decided that Mr. Speck engaged in conduct that was prohibited by Rules that applied to competitive bidding in the Telecom Program.⁷⁷ To support that argument, ABS submitted an 18-page memorandum that traced the 20-year history of the Commission’s competitive bidding requirements, and showed that the HCPs and ABS were only subject to the competitive bidding and certification requirements of § 54.603 of the Telecom Program Rules, which were materially different than the “fair and open” competitive bidding requirements of § 54.504 of the E-Rate Rules and § 54.642 of the HCF Rules.⁷⁸ ABS summarized the differences in the following table.

	E-RATE	TELECOM	HCF
Applicable Rules	§§ 54.500 – 54.523	§§ 54.602-54.625 §§ 54.671-54.680	§ 54.602 §§ 54.630-54.680
Fair and Open Competitive Bidding Required	Yes § 54.503(a)	No § 54.603(a)	Yes § 54.642(b)(1)
A Consultant Who Has a Sales Commission Arrangement with a Bidding Service Provider Cannot Be Involved in the Preparation of the Form 465, the Form 470, or a Request for Services, or in the Vendor Selection Process	Yes § 54.503(a), Note	No § 54.603	Yes §54.642(b)(2)
An Individual Cannot Be Listed as the Contact Person on a Form 465 or a Form 470, or Serve as a Point of Contact, and Be Affiliated with a Bidding Service Provider	Yes § 54.503(a), Note	No § 54.603	Yes §54.642(b)(2)(ii)
All Potential Bidders Must Have Access to the Same Information and Must Be Treated in the Same Manner	Probably § 54.503(a), Note	No § 54.603	Yes §54.642(b)(3)

ABS also argued that, by adopting §§ 54.602(a) and 54.603(a) of the Telecom Program Rules, the *RHC Reform R&O* overruled any prior precedent that suggested that a Telecom Program participant was subject specifically to the competitive bidding provisions and limitations set forth in § 54.503 of the E-rate Rules or § 54.642 of the HCF Rules, or generally to a requirement that a “competitive bidding process be fair and open.”⁷⁹ Because §§ 54.602(a) and 54.603(a) of the Telecom Program Rules were adopted in an APA notice-and-comment rulemaking proceeding,

⁷⁷ See ABS Appeal at 6-7.

⁷⁸ See *id.*, Attach. 4 at 2-9.

⁷⁹ See *id.* at 5.

they could only be changed in an APA rulemaking, not in an adjudication or by construction.⁸⁰

ABS identified five errors committed by the RHCD:

- (1) Because § 54.603 of the Telecom Program Rules does not prohibit anyone from receiving a sales commission for any purpose, ABS could not have violated § 54.603 by receiving sales commissions from Windstream for identifying and bringing customers to it.
- (2) The Form 465 calls for contact names and addresses for the purposes of establishing the physical location of the HCP and the mailing address where correspondence to the HCP should be sent. Section 54.603 does not limit who can be listed as a HCP contact on a Form 465. Therefore, the HCPs could not have violated § 54.603 by submitting Form 465s that listed Mr. Speck as both the HCP contact and certifying party, while ABS was listed as Mr. Speck's employer.
- (3) It is irrelevant that Mr. Speck was the only person who interfaced with all prospective bidders in response to their requests for bid sheets during the competitive bidding period. Section 54.603 neither requires the provision of a bidding sheet nor limits the people who may respond to a bidder's request for a bidding sheet.
- (4) Section 54.603 does not prohibit anyone from having a financial interest in the selection of a service provider. Therefore, Mr. Speck could not have violated § 54.603 by having a financial interest in the selection of Windstream as the service provider for the HCPs.
- (5) Section 54.603(a) requires an eligible HCP to participate in a competitive bidding process pursuant to the requirements established in § 54.603. That the competitive bidding process be fair and open is not one of the requirements established by § 54.603. In fact, the FCC decided in December 2012 that it would not amend § 54.603 to add a requirement that all entities participating in the Telecom Program must conduct a fair and open competitive bidding process. Therefore, it is especially irrelevant whether or not Mr. Speck's affiliation with Windstream undermined fair and open competitive bidding for all the FRNs identified by the RHCD.⁸¹

ABS also argued that the evidence showed that the HCPs participated in fair and open competitive bidding processes in which all potential bidders were treated in the same manner and had the same opportunity to bid.⁸² Finally, ABS asserted that it had a due process right to have

⁸⁰ *See id.*

⁸¹ *See id.* at 6-7.

⁸² *See id.* at 8-10.

access to the documentary evidence in the record, and the RCHD erred by withholding the documents that it had cited in its decision.⁸³

Windstream filed an appeal with USAC on May 11, 2017, but did not serve ABS with a copy of its appeal.⁸⁴ The following day, Windstream informed undersigned counsel of the following:

The Commission's rules do not require Windstream to serve you with a copy of its appeal in these circumstances, and we decline to do so. As a general matter, there is no service requirement for appeals or related materials submitted to USAC, subject to a narrow exception where the appellant "alleges prohibitive conduct on the part of a third party." 47 C.F.R. § 54.721(d). In this case, while *USAC* has alleged certain rule violations by ABS and Mr. Speck, Windstream has not made such allegations. Accordingly, Windstream has no obligation to serve your clients with a copy of its appeal. Moreover, any other materials provided by Windstream in response to information requests from USAC are not subject to disclosure under the [FOIA]. *See* 5 U.S.C. § 552(b)(7); 47 C.F.R. § 0.457(d)(1)(iii).⁸⁵

On September 8, 2017, ABS finally obtained a redacted copy of the Windstream Appeal from the Wireline Competition Bureau ("WCB") pursuant to a FOIA request.⁸⁶ ABS learned that Windstream had attempted to make ABS solely liable for any violation of the competitive bidding rules by misrepresenting that it was unaware that Mr. Speck was a consultant for the HCPs or that he was listed as a contact person on the Forms 465. The Windstream Appeal included the following representations:

⁸³ *See id.* at 10-11.

⁸⁴ *See* Letter from Matthew A. Brill & Elizabeth R. Park to USAC (May 11, 2017) ("Windstream Appeal"). On May 12, 2017, the HCPs filed a request that the Commission waive "certain competitive bidding requirements" and reverse the RHCD's decision. UTHSCT Request at 1. The HCPs served ABS with a copy of their appeal. *See id.* at 11.

⁸⁵ FOIA Appeal, Ex. 3 at 10 (emphasis in original).

⁸⁶ *See id.*, Exs.1 & 4. On May 23, 2017, undersigned counsel participated in a conference call which included several members of the RHCD staff, counsel for the HCPs, and counsel for Windstream. He asked to be given a copy of the Windstream Appeal. The request was denied by Windstream and the RHCD. The staff informed counsel that he had to file a FOIA request to obtain a copy of the document. After the conference call ended, counsel went ahead and submitted a FOIA request that the Commission produce the Windstream Appeal for inspection. *See* ABS Response at 3. *See also* FOIA Appeal, Ex. 3 at 12-15.

Windstream received funds under the RHC program for Funding Years 2012-2014, as well as a small portion of the funds committed for Funding Year 2015. During this time, and unbeknownst to Windstream, it appears that Mr. Speck was listed as the contact person on the ... Forms 465 submitted on behalf of the [HCPs] for whom Windstream was bidding to provide service.

On or around February 12, 2016, Windstream management first discovered the potential dual role played by ABS. At that time, Windstream was contemplating a bid to provide service under a new contract with UTHSC[T]. In the course of discussions regarding this potential bid, Windstream discovered that ABS may have been acting as a consultant for UTHSC[T] while serv[ing] as Windstream's channel partner. As soon as this issue came to Windstream's attention, Windstream undertook an internal investigation regarding the nature of ABS and Mr. Speck's role in connection with the UTHSC contracts.

That internal investigation revealed that Mr. Speck was indeed acting as a consultant for UTHSC in connection with the bid, along with his wife and business partner, Amy Speck.^[87]

* * * * *

USAC has alleged that ABS and its principal, Gary Speck, created a conflict of interest by providing consulting services to RHC participants while acting as a sales agent for Windstream and other service providers. Significantly, Windstream was not responsible for or aware of that dual role during the relevant time frame.^[88]

* * * * *

While USAC alleges that ABS and Mr. Speck created a conflict of interest that may have caused UTHSC[T] to violate the competitive bidding rules, there is no evidence here ... that Windstream was responsible for any violation of the Commission's competitive bidding requirements.^[89]

* * * * *

Applying that precedent here might justify recovery of commissions paid to ABS and Mr. Speck, depending on USAC's findings regarding those parties ... but *not* denial of funding to Windstream for providing the supported services without any knowledge of a conflict.^[90]

* * * * *

[T]here is no evidence that any employee of Windstream created, was responsible for, or aware of the conflict of interest that USAC alleges to have been caused by

⁸⁷ Windstream Appeal at 3-4 (footnotes omitted).

⁸⁸ *Id.* at 6.

⁸⁹ *Id.* at 8.

⁹⁰ *Id.* at 10 (emphasis in original).

ABS.⁹¹

In addition to alleging that ABS and Mr. Speck engaged in prohibited conduct, Windstream requested that USAC recover funds from ABS:

Pursuant to the Commission's policy of directing USAC recovery actions to the party that committed the underlying violation, Windstream respectfully submits that, to the extent USAC finds that a conflict of interest existed, *it should limit any effort to recover funds to ABS*. **** Here, if USAC determines that ABS caused a conflict of interest, it would be reasonable for USAC to *seek disgorgement of the commission payments ABS received from Windstream*, given that those payments arguably would be tainted by ABS's dual role in consulting with UTHSC and serving as Windstream's sales agent.⁹²

* * * * *

While recovering funding from ABS based on the conflict of interest alleged by USAC would assign responsibility appropriately and conform to Commission precedent, requiring Windstream to forgo funds that were awarded under the RHC program would present a serious risk of causing an unconstitutional taking. **** Retroactively depriving Windstream of the promised funding – particularly absent evidence that Windstream was responsible for any conflict of interest – would amount to a confiscation of property without just compensation.

Basic principles of equity also militate against any effort to withhold or claw back funding based on the conduct of a third party. **** Windstream acted in good faith in submitting bids to the [HCPs] and in providing the contracted services. As explained above, Windstream was unaware of the alleged rule violations until 2016, well after receipt of funds for several of the Funding Years at issue. At bottom, to the extent USAC finds that ABS and Mr. Speck violated the FCC's rules, Windstream was a victim of such misconduct rather than a beneficiary."⁹³

ABS responded to the redacted version of the Windstream Appeal by proffering the declarations of Mr. Bates, who was ABS' Windstream channel manager from February 2011 to December 2014, and Mr. Speck.⁹⁴ The Bates and Speck declarations established not only that Windstream knew right from the very beginning that Mr. Speck would be a consultant for the

⁹¹ *Id.*

⁹² *Id.* at 11 (emphasis added).

⁹³ *Id.* at 12-13 (footnote omitted).

⁹⁴ See ABS Response, Ex. 3 at 1 (¶ 1), Ex. 4 at 2 (¶ 5).

HCPs, but that Windstream’s legal department approved of the arrangement before Windstream entered into the channel partner agreement with ABS on March 15, 2011.⁹⁵ The declarations also showed that Windstream’s AVP of Indirect Sales, Ms. Kadlacek, learned that Mr. Speck would act as a consultant to the HCPs and be compensated by Windstream no later than December 13, 2011⁹⁶ – more than four years before Windstream claimed that its management “first discovered” the potential dual role played by Mr. Speck.⁹⁷

ABS also produced documentary evidence that Windstream’s legal department knew as late as March 30, 2015, that ABS was acting as a consultant for Hunt Memorial Hospital District (“Hunt”) in connection with its participation in the Telecom Program.⁹⁸ The evidence showed that, on February 12, 2015, Ms. Amy Speck sent an email to Mr. Mungeer (ABS’ Windstream channel manager) notifying him that ABS had submitted a Form 465 for Hunt to the RHCD.⁹⁹ She asked Mr. Mungeer to “make sure” to “capture” the Hunt project as an “ABS ... project.”¹⁰⁰

Mr. Speck declared under penalty of perjury that Windstream bid on the Hunt project and, as the only bidder, was awarded the contract.¹⁰¹ During its contract negotiations with Windstream, Hunt requested changes to the service agreement with Windstream.¹⁰² Mr. Speck drafted an

⁹⁵ See *id.*, Ex. 3 at 2-3 (¶¶ 4-6); Ex. 4 at 2 (¶ 7).

⁹⁶ See *id.*, Ex. 3 at 2 (¶ 5), 3 (¶ 9); Ex. 4 at 3 (¶ 11).

⁹⁷ Windstream Appeal at 4. Windstream provided USAC with the declaration of its Director – Regulatory Reporting, Tim Loken, who declared under penalty of perjury that “[o]n or about February 12, 2016, in the course of preparing for a potential bid to provide service under a new contract with UTHSC[T], Windstream management first discovered that ABS and Mr. Speck may have been acting in a consultancy capacity for UTHSC[T] while serving as Windstream’s channel partner.” Declaration of Tim Loken at 2 (¶ 7) (May 11, 2017).

⁹⁸ See ABS Response at 11.

⁹⁹ See *id.*, Ex. 4 at 8 (Attach. B).

¹⁰⁰ *Id.*

¹⁰¹ See *id.* at 5 (¶ 16).

¹⁰² See *id.*

addendum to the service agreement that included the new terms that Hunt requested, and he gave the draft to Mr. Mungeer.¹⁰³ Apparently, Mr. Mungeer sent the draft addendum to Windstream's legal department for review and approval.¹⁰⁴

On March 30, 2015, Mr. Mungeer emailed an "Addendum to Service Terms and Conditions" ("Hunt Addendum") to Mr. Speck and James E. Pearce, Windstream's Vice President – Channel Sales.¹⁰⁵ In his email, Mr. Mungeer explained that "legal requires it to be in Windstream legal addendum format so that it ties to the agreement formally."¹⁰⁶ The Hunt Addendum, which Mr. Mungeer subsequently signed as of April 8, 2015, called for ABS to submit documents to USAC so that Windstream would receive Telecom Program funding.¹⁰⁷

Mr. Speck also declared that he submitted a Form 465 for Hunt on January 16, 2016, and that he subsequently called Mr. Mungeer and informed him that he had submitted that Form 465 for Hunt.¹⁰⁸ In his conversation with Mr. Mungeer, Mr. Speck asked that Windstream bid on the Hunt project.¹⁰⁹ Since Mr. Mungeer had been ABS' channel manager since late 2014, he knew that Mr. Speck represented a Windstream channel partner.¹¹⁰

¹⁰³ See *id.* at 5 (¶ 16), 10 (Attach. D).

¹⁰⁴ See *id.* at 5 (¶ 16).

¹⁰⁵ See *id.* at 12 (Attach. E).

¹⁰⁶ *Id.*

¹⁰⁷ See *id.* at 13-14. The Hunt Addendum provided that: (1) Hunt was "responsible to pay directly to Windstream the equivalent of the Urban Rate (\$665/month)" with respect to three projects; (2) ABS would submit the documentation to the RHCD required to obtain from the Telecom Program the difference between the urban rate and rural rates of \$46,338.60, \$41,626.20, and \$40,055.40 per month; (3) such amounts would be paid directly to Windstream from the Telecom Program; and (4) Hunt "must respond within a 2 day window" to all program-related requests from, *inter alia*, USAC, ABS, and/or Windstream. See *id.* at 13.

¹⁰⁸ See *id.* at 6 (¶ 19).

¹⁰⁹ See *id.*

¹¹⁰ See *id.*

ABS provided USAC with documentary evidence that corroborated that Mr. Speck filed a Form 465 for Hunt on January 16, 2016, and subsequently spoke with Windstream about the filing. It produced a copy of the information request, dated August 1, 2017, that the RHCD sent to Windstream requiring it to submit a “complete list” of the channel partners it compensated “in connection with the competitive bidding process for ... Form 465 Application Number 43160643” (“Hunt Form 465”).¹¹¹

ABS also gave USAC a copy of Mr. Loken’s response to the RHCD’s information request, which he certified was “true, accurate and complete” on August 15, 2017.¹¹² Mr. Loken’s response read in pertinent part as follows:

In connection with the competitive bidding process initiated by [the Hunt Form 465], Windstream has determined that it worked with and compensated ABS ... and its principal, Gary Speck ... as a channel partner.

Around the time of Windstream’s bid on the Hunt project in question, Windstream had recently discovered that ABS may have been acting as a consultant for another Windstream customer that was a [Telecom Program] participant, and Windstream accordingly commenced an internal investigation into whether ABS was serving a dual role as Windstream’s channel partner while also serving as a consultant for that customer or other customers. When considering a bid on the Hunt project, however, Windstream’s government support team concluded that no such conflict would exist for any agreement with Hunt, based on their understanding (from a review of previous Form 465 requests) that Hunt had engaged a different consultant, PEM Filings.

More specifically, Windstream’s sales team received an informal request to submit a bid on the Hunt project in question by phone from Mr. Speck, and was not aware of the specific Form 465 for that project at the time it evaluated whether to bid. Based on the belief that Hunt was not represented by ABS in connection with the instant project, Windstream proceeded to submit a bid.

In March 2016, after the contract for services ... had been executed, Windstream discovered the [Hunt] Form 465 on the USAC website and became aware that ABS was acting as Hunt’s consultant on this particular request for services. After completing its internal review, Windstream determined that the best course of action was to terminate its relationship with ABS and Mr. Speck – and Windstream

¹¹¹ *Id.* at 15 (Attach. F).

¹¹² *Id.* at 18.

informed ABS of such termination on April 19, 2016. Windstream maintained the service agreement with Hunt (a) to avoid disruption of services and potential economic harm to the customer, and (b) based on Windstream's determination that its bid was not affected by any potential conflict arising from ABS's dual role.¹¹³

ABS charged that the Hunt Addendum provided additional proof that Windstream had dissembled before USAC.¹¹⁴ It showed that Mr. Mungeer and Windstream's Vice President – Channel Sales, Mr. Pearce, were aware that ABS was playing the dual role of a Windstream channel partner and a consultant to Hunt on March 30, 2015, more than ten months before Mr. Loken claimed that Windstream management “first discovered” that ABS may have been acting as a consultant for an HCP.¹¹⁵

ABS also alleged that Mr. Loken misled the RHCD when he represented that Windstream discovered the Hunt Form 465 on the USAC website in March 2016 and “became aware that ABS was acting as Hunt's consultant on this particular request for services.”¹¹⁶ It argued that Windstream's management must have learned soon after February 12, 2016, what Mr. Mungeer had known for nearly a month: Mr. Speck had acted as Hunt's consultant when he filed the Hunt Form 465 on January 16, 2016.¹¹⁷

Finally, ABS charged that Windstream violated § 1.17 of the Rules by making false statements in the Windstream Appeal without a reasonable basis for believing that the statements were correct and not misleading.¹¹⁸ And ABS argued:

¹¹³ *Id.* at 17-18.

¹¹⁴ *See* ABS Response at 13.

¹¹⁵ *See id.* at 13-14.

¹¹⁶ *Id.* at 15.

¹¹⁷ *See id.*

¹¹⁸ *See* Letter from Russell D. Lukas to USAC at 8 (Dec. 29, 2017) (“ABS Second Response”). Attached hereto as Exhibit 6 is a table that sets forth a chronology of the relevant facts as alleged by ABS or represented by Windstream. The table was presented to USAC. *See id.* at 10-11. The ABS Second Response is incorporated herein by this reference.

The evidence also shows that Windstream misrepresented facts in its appeal papers in order to conceal that it had knowingly engaged in the alleged conflict of interest for a five-year period. And we submit that the Windstream Appeal was not served on us for the purpose of preventing us from putting the true facts in the record. This unfortunate episode demonstrates why the RHCD should have given us the Windstream Appeal when we first asked for it.¹¹⁹

G. The NPRM

Nine months after the RHCD decided that Mr. Speck's role as the contact person listed on the Forms 465 for the HCPs and his affiliation with Windstream was "*precisely* [the] type of relationship between an HCP's contact person and a service provider that is prohibited by the FCC's rules,"¹²⁰ the Commission proposed to amend § 54.603 of the Telecom Program Rules to prohibit *for the first time* consultants who have a sales commission arrangement with a bidding service provider from serving as a point of contact for an HCP. *See Promoting Telehealth in Rural America*, 32 FCC Rcd 10631, 10659 (¶ 88) (2017) ("*NPRM*"). In fact, the Commission is proposing to adopt an entirely new competitive bidding rule for the Telecom Program that would include the following provisions:

(b) *Fair and open process.* (1) All entities participating in the Telecom[] Program, including vendors, must conduct a fair and open competitive bidding process, consistent with all applicable requirements.

(2) Vendors who intend to bid to provide supported services to a [HCP] may not simultaneously help the [HCP] choose a winning bid. Any vendor who submits a bid, and any individual or entity that has a financial interest in such a vendor, is prohibited from: preparing, signing or submitting an applicant's request for services or supporting documentation; serving as the point of contact on behalf of the applicant; being involved in setting bid evaluation criteria; or participating in the bid evaluation or vendor selection process (except in their role as potential vendors).¹²¹

¹¹⁹ ABS Response at 16.

¹²⁰ Further Explanation at 7.

¹²¹ *NPRM*, 32 FCC Rcd at 10676.

H. The RCHD Decisions

In October 2017, USAC issued Commitment Adjustment Letters (“COMADs”) to Windstream, which adjusted the Telecom Program funding committed to Burke, Trinity, and UTHSCT based on the RCHD Decision.¹²² Windstream appealed and requested that USAC reverse the funding adjustments.¹²³ Citing the *NPRM*, Windstream argued that USAC is attempting to enforce “fair and open” competitive bidding requirements that do not apply to participants in the Telecom Program.¹²⁴ It claimed that, “even if there were some basis for some type of funding adjustment as a result of the ABS dual role, it would be wholly improper to deprive Windstream of compensation for the services it provided to UTHSC[T].”¹²⁵ Windstream repeated the request it made in the Windstream Appeal that, “to the extent USAC finds that a conflict of interest existed, it should limit any effort to recover funds to ABS.”¹²⁶

As permitted by § 54.721(d) of the Rules,¹²⁷ ABS responded to the Windstream COMADs Appeal.¹²⁸ Of course, ABS agreed with Windstream’s argument that USAC is trying to enforce competitive bidding requirements that do not apply to Telecom Program participants.¹²⁹ It also agreed that the *NPRM* constituted the Commission’s acknowledgement that the current Telecom Program Rules “do not prohibit a contact person listed on the Form 465 from receiving sales

¹²² See Letter from Matthew A. Brill & Elizabeth R. Park to USAC at 3 (Dec. 19, 2017) (“Windstream COMADs Appeal”). A copy of the Windstream COMADs Appeal was served on ABS.

¹²³ *See id.* at 1.

¹²⁴ *See id.* at 7-8.

¹²⁵ *Id.* at 13.

¹²⁶ *Id.* at 13-14.

¹²⁷ *See* 47 C.F.R. § 54.721(d) (2017).

¹²⁸ *See* ABS Second Response at 1.

¹²⁹ *See id.* at 2.

commissions from a bidding service provider.”¹³⁰ And ABS “agree[d] entirely with Windstream that existing § 54.603 of the Telecom [Program] Rules does not apply to vendors, and that Windstream did not violate any applicable competitive bidding requirements.”¹³¹

On the other hand, ABS challenged Windstream’s statement of facts, which mirrored those it made in the Windstream Appeal, and it alleged that Windstream had violated § 1.17 of the Rules.¹³² ABS concluded with the following request for relief:

We join Windstream in urging USAC to grant the Windstream [COMADs] Appeal and to reinstate funding for services rendered to the UTHSCT HCPs. In the unfortunate event that USAC mistakenly persists in believing that Telecom [Program] Rules were violated in this case, it should deny Windstream’s request that it “limit any effort to recover funds to ABS.” In any event, USAC should determine whether Windstream violated § 1.17 of the Rules in this and other proceedings involving its [channel partner agreement] with ABS.¹³³

On the same day it issued the USAC Decision denying the ABS Appeal, the RHCD issued separate decisions denying the Windstream Appeal¹³⁴ and the Windstream COMADs Appeal.¹³⁵ All three decisions included identical findings and conclusions.¹³⁶ Nevertheless, and despite the fact that ABS had responded to both the Windstream Appeal and the Windstream COMADs

¹³⁰ *Id.*

¹³¹ *Id.* at 4.

¹³² *See id.* at 6-13. Windstream resubmitted the Windstream Appeal as Exhibit B to the Windstream COMADs Appeal.

¹³³ *Id.* at 13 (citations omitted).

¹³⁴ *See* Letter from USAC to Matthew A. Brill & Elizabeth R. Park (June 29, 2018) (“Windstream Appeal Decision”). The Windstream Appeal Decision is attached as Exhibit 7. It was issued on RHCD letterhead. *See infra* Ex. 7 at 1.

¹³⁵ *See* Letter from USAC to Matthew A. Brill & Elizabeth R. Park (June 29, 2018) (“Windstream COMADs Appeal Decision”). The Windstream COMADs Appeal Decision is attached as Exhibit 8. Like the USAC Decision and the Windstream Appeal Decision, the Windstream COMADs Decision was issued on RHCD letterhead. *See infra* Ex. 8 at 1.

¹³⁶ *See* USAC Decision at 9; Windstream Appeal Decision at 6; Windstream COMADs Appeal Decision at 8.

Appeal as a “third party” under § 54.721(d),¹³⁷ the RHCD did not give ABS a copy of either the Windstream Appeal Decision or the Windstream COMADs Appeal Decision.

Shortly after receiving a copy of the USAC decision from Ms. Pilgrim, undersigned counsel wrote her a letter in which he stated:

Thank you for sending me a copy of the [USAC Decision].... I noted, however, that a copy of the RHCD’s decision was apparently not served on Windstream ... which also appealed the denial of the HCPs’ funding requests. Because Windstream was clearly entitled to such service under the Commission’s ex parte rules, I emailed a copy of the decision to Windstream’s counsel.

Since the Windstream and ABS appeals involve substantially the same issues, and present conflicting claims, I expected that the RHCD would consolidate the appeals and act on them simultaneously. Therefore, I was surprised when the RHCD’s decision only addressed the ABS appeal. However, if the RHCD has issued a decision on the Windstream appeal, but failed to serve the decision on me, please do so posthaste. If the RHCD has not acted on that appeal, please give me a copy of the decision as soon as it is issued.¹³⁸

The RHCD refused to give counsel for ABS copies of the Windstream Appeal Decision and the Windstream COMADs Appeal Decision. On August 9, 2018, the RHCD informed counsel:

USAC is unable to share with you a copy of the appeal decision issued to Windstream. As the Commission’s ex parte rules do not apply to decisions made by USAC, ABS ... is not entitled to a copy of the decision on the appeal filed by Windstream. If you would still like a copy of the appeal decision letter issued to Windstream, you can either request this documentation from Windstream or, alternatively, submit a [FOIA] request in accordance with the requirements set forth in 47 C.F.R. § 0.461.¹³⁹

At the request of undersigned counsel, counsel for Windstream graciously provided ABS with courtesy copies of the Windstream Appeal Decision and the Windstream COMADs Appeal

¹³⁷ 47 C.F.R. § 54.721(d) (2017).

¹³⁸ Letter from Russell D. Lukas to Lisa Pilgrim at 1 (July 3, 2018). A copy of the letter is attached as Exhibit 9.

¹³⁹ Letter from Tori Schwetz to Russell D. Lukas at 1 (Aug. 9, 2018). A copy of Ms. Schwetz’s letter is attached as Exhibit 10.

Decision on August 9, 2018. Two weeks later, on August 23, 2018, Windstream served a copy of the Windstream Request upon ABS.

ARGUMENT

I. COMPETITIVE BIDDING REQUIREMENTS THAT ARE NOT SET FORTH IN § 54.603 OF THE TELECOM PROGRAM RULES ARE UNENFORCEABLE AGAINST TELECOM PROGRAM PARTICIPANTS

USAC finally made it clear that it did not deny the HCPs' funding requests because of a violation of § 54.603 of the Telecom Program Rules. *See* USAC Decision at 7. USAC admits that its actions were "based on a violation of the fair and open competitive bidding requirements" which it claims apply to Telecom Program participants. *Id.* As ABS has established, and will show again, there are no fair and open competitive bidding requirements that apply to participants in the Telecom Program.¹⁴⁰ Thus, ABS agrees with Windstream's threshold argument that USAC improperly enforced fair and open competitive bidding requirements that did not apply to the parties below. *See* Windstream Request at 7-9. We will expand on that basic argument.

A. The Requirements of § 54.603 of the Telecom Program Rules Cannot Be Materially Changed Absent a Notice-and-Comment Rulemaking

A legislative rule is one that may be promulgated only after compliance with the notice-and-comment requirements of § 553 of the APA. *See Central Texas Telephone Cooperative, Inc. v. FCC*, 402 F.3d 205, 210 (D.C. Cir. 2005). It is a "maxim of administrative law" that a new rule that works a "substantive change" in a prior legislative rule is subject to the notice-and-comment requirements of the APA. *Sprint Corp. v. FCC*, 315 F.3d 369, 374 (D.C. Cir. 2003). In other words, a rule that "amends a prior legislative rule" is a legislative rule, *SBC Inc. v. FCC*, 414 F.3d 486, 498 (D.C. Cir. 2005), and such a rule "can be valid only if it satisfies the notice-and-comment

¹⁴⁰ *See* ABS Appeal, Attach. 4 at 11-12; ABS Second Response at 1-5.

requirements of the APA.” *United States Telephone Ass’n v. FCC*, 400 F.3d 29, 38 (D.C. Cir. 2005).

Section § 54.603 of the Telecom Program Rules is a legislative rule¹⁴¹ that was adopted and amended in notice-and-comment rulemakings.¹⁴² Therefore, an additional notice-and-comment rulemaking was necessary if the Commission decided to make a valid, substantive change in § 54.603. That is particularly so if the Commission wanted to amend § 54.603 to include fair and open competitive bidding requirements similar to those it adopted for the HCF in 2012, but *declined* to adopt for the Telecom Program. *See RHC Reform R&O*, 27 FCC Rcd at 16815 (¶ 342). The Commission could not adopt such requirements for the Telecom Program by adopting the requirements in an adjudication and enforcing them retroactively against the parties. Yet, that is effectively what the Telecommunications Access Policy Division (“TAPD”) did in *Hospital Networks Management, Inc.*, 31 FCC Rcd 5731 (TAPD 2016).

In *Hospital Networks*, the TAPD was “deeply troubled” about practices which “undermine the framework of the competitive bidding process” and “ultimately damage the integrity of the [RHC Program].” 31 FCC Rcd at 5742 (¶ 21). Therefore, the TAPD announced that “principles” underlying “orders addressing fair and open competitive bidding not only apply to the E-rate [P]rogram ... but also to participants in the [RHC Program].” *Id.* at 5741 (¶ 20). Noting that “USAC is expected to commence recovery actions when it is made aware of a violation of the

¹⁴¹ Four criteria are used to identify a legislative rule: “(1) whether in the absence of the rule there would not be an adequate legislative basis for enforcement action or other agency action to confer benefits or ensure the performance of duties, (2) whether the agency has published the rule in the Code of Federal Regulations, (3) whether the agency has explicitly invoked its general legislative authority, or (4) whether the rule effectively amends a prior legislative rule.” *American Mining Congress v. Mine Safety & Health Admin.*, 995 F.2d 1106, 1112 (D.C. Cir. 1993). “If any one criterion is met, the agency action is a legislative rule subject to the notice-and-comment procedures.” *Steinhorst Associates v. Preston*, 572 F.Supp.2d 112, 120 (D.D.C. 2008).

¹⁴² *See supra* pp. 4-9.

[Rules],” the TAPD denied the appeals and directed USAC “to continue its recovery actions.” *Id.* at 5742 (¶ 21). Thus, in *Hospital Networks*, the TAPD enforced fair and open competitive bidding *principles* retroactively as if they were fair and open competitive bidding *Rules*.

The TAPD’s decision in *Hospital Networks* could not work a substantive change in the competitive bidding requirements set forth in § 54.603 of the Telecom Program Rules. Nor could *Hospital Networks* prescribe fair and open competitive bidding requirements that can be enforced as if they had been promulgated by the Commission in a notice-and-comment rulemaking. Yet, USAC cited *Hospital Networks* no less than 15 times as its authority to enforce fair and open competitive bidding requirements¹⁴³ that it admits “have not been codified in existing Telecom Program [R]ules.” USAC Decision at 6.

Allowing USAC to enforce fair and open competitive bidding requirements against Telecom Program participants that have not been codified in the Telecom Program Rules would undermine the notice-and-comment requirements of the APA. Accordingly, and because § 54.603 of the Telecom Program Rules cannot be materially changed absent a notice-and-comment rulemaking, and since the *RHC Reform R&O* did not add such requirements to § 54.603, the Commission should hold that the fair and open competitive bidding requirements prescribed by *Hospital Networks*, and enforced by USAC in the USAC Decision, are invalid under the APA and unenforceable.

B. Proposed § 54.603 of the Telecom Program Rule Cannot Be Enforced Prior to Its Adoption in the Rulemaking in WC Docket No. 17-310

According to USAC, the Commission “explicitly acknowledged in the [NPRM] that the proposed, formal adoption of rules codifying the fair and open standard for the Telecom Program, as proposed in the [NPRM], would merely codify its existing competitive bidding requirements,

¹⁴³ See USAC Decision at 2 n.4, 3 nn.9, 10, 11, 12, 13, 14, 4 n.15, 6 n.29, 32, 7 nn.35, 36, 37, 39, 8 n.46.

and noted that a process that is not ‘fair and open’ is inherently inconsistent with ‘competitive bidding.’”¹⁴⁴ We submit that, by proposing to codify fair and open competitive bidding requirements in § 54.603 of the Telecom Program Rules, the Commission effectively held that fair and open competitive bidding requirements could not be enforced by USAC.

In its *NPRM*, the Commission explicitly acknowledged that the Telecom Program “has not been significantly reviewed or revised since its inception in 1997,” 32 FCC Rcd at 10634 (¶ 4), and that “[t]here have been no significant changes to the Telecom Program in the two decades since it was first established.” *Id.* (¶ 6). The Commission is proposing a very significant change to § 54.603 of the Telecom Program Rules that will impose many new requirements on all participants in the Telecom Program.¹⁴⁵ In fact, the adoption of proposed § 54.603 will substitute a 1,931-word rule for the existing 519-word rule.

The Commission recognized in the *NPRM* that there is no Telecom Program Rule that regulates consultants, such as ABS and Mr. Speck. *See* 32 FCC Rcd at 10659 (¶ 88) (“Other than the ‘declaration of assistance’ requirement for HCF ... participants, the Commission has not adopted detailed rules regarding consultant participation in the RHC Program”). Section 54.642 of the HCF Rules currently reaches consultants to the extent that they have a “financial interest” in a vender that intends to bid to provide supported services. 47 C.F.R. § 54.642(b)(2) (2017). Such consultants are prohibited from: preparing, signing, or submitting an HCP’s request for services; serving as the HCP’s point of contact; being involved in setting bid evaluation criteria; or participating in the bid evaluation or vendor selection process. *See id.* § 54.642(b)(2)(i)-(iv). There are no such prohibitions in the Telecom Program Rules. Indeed, the Commission claims

¹⁴⁴ USAC Decision at 6 (quoting *NPRM*, 32 FCC Rcd at 10633 (¶ 100)) (footnotes omitted).

¹⁴⁵ A table that compares the existing § 54.603 of the Telecom Program Rules to the proposed rule is attached as Exhibit 11.

that only “procedures” adopted by USAC apply to consultants:

USAC procedures ... subject consultants to the same prohibitions as the applicant itself with respect to the competitive bidding process. In particular, USAC procedures prohibit consultants or outside experts who have an ownership interest, sales commission arrangement, or other financial stake with respect to a bidding service provider from performing any of the following functions on behalf of the applicant: (1) preparing, signing, or submitting the FCC Form 461 or ... Form 465 or supporting documentation; (2) serving as consortium leaders or another point of contact on behalf of a [HCP]; (3) preparing or assisting in the development of the competitive bidding evaluation criteria; or (4) participating in the bid evaluation or service provider selection process (except in their role as potential providers). The purpose of these procedures is to ensure that consultants or outside experts do not undermine the competitive bidding process by simultaneously acting on behalf of the [HCP] and the service provider.¹⁴⁶

In fact, the USAC “procedures” that the Commission enumerated are actually “prohibitions” which apply only to consultants participating in the HCF Program.¹⁴⁷ In fact, USAC simply restates the prohibitions set forth in § 54.642(b)(2) of the HCF Rules.¹⁴⁸ In any event, USAC’s procedures are obviously not Rules. They are not enforceable to prohibit a consultant from being listed as a contact person on a Form 465 and having a sales commission arrangement with a service provider that is bidding to provide services supported by the Telecom Program.

USAC effectively held that ABS and Mr. Speck engaged in conduct that would violate a Telecom Program Rule if committed *after* the Commission adopts a Telecom Program Rule that is the same or substantially similar to the § 54.603 that is proposed in the *NPRM*. See 32 FCC Rcd at 10676-80. That the Commission is proposing to adopt a new § 54.603(b) evinces the fact that current § 54.603 does not: (1) require all Telecom Program participants, including service

¹⁴⁶ *NPRM*, 32 FCC Rcd at 10659 (¶ 88) (footnote omitted) (citing USAC, RHC Program, HFC Program, Consortia, Consultants, <http://www.usac.org/rhc/healthcare-connect/Consortia/consultants.aspx>). A screenshot of USAC’s so-called procedures for consultants is attached hereto as Exhibit 12.

¹⁴⁷ See *infra* Ex. 12 at 1 (consultants who have a sales commission arrangement with a bidding service provider are prohibited from “[p]reparing, signing or submitting the FCC Form 461 or supporting documentation”).

¹⁴⁸ Compare Ex. 12 with 47 C.F.R. § 54.642(b)(2)(i)-(iv) (2017).

providers and consultants, to conduct “fair and open” competitive bidding processes; or (2) prohibit a consultant with a financial interest in a bidding service provider from either “preparing, signing or submitting an applicant’s request for services” or “serving as the point of contact on behalf of the applicant.” *See id.* at 10663 (¶ 100) (the “fair and open” competitive bidding standard “is not codified under the Telecom Program”). Contrary to its suggestion, the Commission is not merely proposing to codify existing requirements. *See id.* (“Because we are merely proposing to codify an existing requirement, RHC Program participants that are already complying with our competitive bidding rules should not be impacted”). It is proposing a new rule that works a “substantive change” in a prior legislative rule. *Sprint*, 315 F.3d at 374 (D.C. Cir. 2003). Once the proposed Telecom Program Rule is adopted, it can only operate prospectively.¹⁴⁹

If the Commission can only enforce its proposed fair and open competitive bidding requirements prospectively if and when they have been adopted and become effective, USAC certainly cannot enforce fair and open competitive requirements against Telecom Program participants now. For that reason, the Commission should reverse the USAC Decision.

II. USAC IS NOT AUTHORIZED TO WITHHOLD DOCUMENTS UNDER FOIA

A. Congress Never Authorized the Commission to Establish USAC or to Subdelegate Any Authority to USAC

As Commissioner O’Rielly has stated, “USAC is neither a part of the FCC nor a federal

¹⁴⁹ A statutory grant of rulemaking authority does not “encompass the power to promulgate retroactive rules unless that power is conveyed by Congress in express terms.” *Bowen v. Georgetown University Hospital*, 488 U.S. 204, 208 (1988). *See Henry Ford Health System v. Dep’t of Health and Human Services*, 654 F.3d 660, 667 (6th Cir. 2011) (“Only express congressional authorization for an agency to regulate retroactively will defeat [the] presumption” that a delegation of rulemaking authority “allows the agency to regulate prospectively”). Congress did not expressly authorize the Commission to engage in retroactive rulemaking. *See* 47 U.S.C. §§ 154(i), 201(b), 254(a)(2), 303(r). Consequently, a Commission rulemaking “operates only prospectively.” *AT&T Co. v. FCC*, 978 F.2d 727, 732 (D.C. Cir. 1992). And “because a rulemaking can affect the conduct of parties only *prospectively*; it does not determine the legality of past conduct.” *Id.* (emphasis in original).

agency, but an independent, private nonprofit corporation governed by a 19-member board composed primarily of industry and advocacy group representatives.” *Mitchell F. Brecher*, 31 FCC Rcd 2406, 2143 (2016). Because it is not a government-controlled corporation, USAC is not an agency for the purposes of FOIA,¹⁵⁰ and the records or information that it compiles are not protected by Exemption 7(E).

In order for a corporation to function as a federal agency, or exercise decision-making authority, it must be specifically authorized to do so by or under a federal statute. *See* 31 U.S.C. § 9102 (“An agency may establish ... a corporation to act as an agency only by or under a law of the United States specifically authorizing the action”); *United States Telecom Ass’n v. FCC*, 359 F.3d 554, 565-68 (D.C. Cir. 2004) (“Congress has not delegated to the FCC the authority to subdelegate to outside parties”). In 1998, the Commission asked Congress for specific statutory authority to designate USAC to administer the federal universal service mechanism. *See Report in Response to Senate Bill 1768 and Conference Report on H.R. 3579*, 13 FCC Rcd 11810, 11819 (1998). Although such authorization was not granted by Congress, the Commission nevertheless proceeded to exercise its general authority under §§ 4(i) and 254 of the Act to designate USAC as the administrator of the universal service program. *See Changes to the Bd. of Directors of NECA*, 13 FCC Rcd 25058, 25065-66 (1998) (“*NECA Changes*”).

The Commission was not authorized by Congress to delegate decision-making authority to USAC. *See id.* at 25131 (dissenting statement of Com’r Furchtgott-Roth).¹⁵¹ Accordingly, when

¹⁵⁰ With specific exceptions not applicable here, the APA defines the term “agency” to mean “each authority of the Government of the United States, whether or not it is within or subject to review by another agency ...” 5 U.S.C. § 551(1). For purposes of the FOIA, the statute provides that “the term ‘agency’ as defined in [§] 551 ... includes any executive department, military department, Government corporation, Government controlled corporation, or other establishment in the executive branch of the Government (including the Executive Office of the President), or any independent regulatory agency.” *Id.* § 552(f)(1).

¹⁵¹ The Commission relied on § 2005(b) of S. 1768, a supplemental appropriations bill adopted by the

it designated USAC to be the sole administrator of the universal service support mechanisms, the Commission emphasized that USAC's function would be "exclusively administrative." *Id.* at 25067. The Commission subsequently has not delegated its authority to "execute and enforce the provisions of [the Act]," 47 U.S.C. § 151, to USAC. *See* 47 C.F.R. § 54.702. Nor could it, insofar as the Commission can only "delegate any of its functions ... to a panel of commissioners, an individual commissioner, an employee board, or an individual." 47 U.S.C. § 155(c)(1). As the Commission has recognized, "USAC is not itself an agency with enforcement powers." *IBM Corp.*, 25 FCC Rcd 11085, 1091 (¶ 13) (2010).

Because it is not a federal agency, USAC is not subject to the FOIA's disclosure requirement. *See* 5 U.S.C. § 552(a) ("Each agency shall make available to the public information as follows ..."). Therefore, the exemptions to FOIA's disclosure requirement do not apply to documents obtained by USAC. *See id.* at § 552(b) ("This section does not apply to matters that are ..."). Hence, documents compiled by USAC are not protected by the FOIA. Moreover, because USAC is without lawful authority to enforce the provisions of the Act – and its statutory authority to administer the Telecom Program is questionable at best – the records or information that USAC compiles certainly cannot be characterized as having been "compiled for law enforcement purposes."

The Commission has delegated law enforcement authority to its Enforcement Bureau ("EB"). *See* 47 C.F.R. § 0.311. It is the EB that serves as the "primary Commission entity" responsible for enforcement of the Act and "other communications statutes," the Rules, and the

Senate in 1998. *See NECA Changes*, 13 FCC Rcd at 25062 n.14, 25066 nn.40, 41, 25067 n.45. However, § 2005(b) was not included in H.R. 3579, the emergency supplemental appropriation bill that was passed by Congress, having been eliminated in conference committee. *See id.* at 25062 n.14. The Conference Report expressly stated that its action should not be considered as expressing the approval of Congress of the Commission's action in establishing one or more corporations to administer § 254(h) of the Act. *See* H.R. Rep. No. 105-504, at 87 (1998).

Commission's orders and authorizations. *Id.* § 0.111(a). And within the EB, it is the USF Strike Force ("Strike Force") that polices the "integrity of USF programs and funds." *FCC Chairman Wheeler Announces USF Strike Force*, 2014 WL 3427571, at *1 (Jul. 14, 2014) ("*Strike Force*").

It is the Strike Force that investigates possible violations of the Telecom Program Rules. *See Network Services Solutions, LLC*, 31 FCC Rcd 12238, 12240-41 (2016). Staffed with "experienced prosecutors, investigators, and forensic analysts,"¹⁵² the Strike Force has both the authority and the expertise to conduct enforcement investigations in accordance with federal law. USAC has neither.

B. The Commission Should Decide that USAC
 Is Not a Federal Agency Subject to the FOIA

USAC appears to conduct itself as if everything it does is cloaked in confidentiality. USAC certainly believes that it can hide behind the FOIA. USAC's misguided view that it can withhold virtually any document in its possession under FOIA appears to be based on the Commission's decisions in cases such as *Daniel E. Riordan*, 22 FCC Rcd 4316 (2007). There the Commission held:

It is true that USAC is a not-for-profit corporation appointed by the FCC as the "permanent Administrator of the federal universal service mechanisms." ... [T]his fact does not render Exemption 7(E) inapplicable USAC must act in accordance with the Commission's orders, rules and directives, and it is clear that the FCC has authorized USAC to review applications in the course of its administration of the program. In this regard, USAC acts under the FCC's oversight and its actions regarding applications are subject to FCC review. Thus, USAC's actions in reviewing applications are performed under the FCC's authority to ensure that the e-rate program is administered in accordance with all applicable law. Indeed, the ... document sought ... was reviewed and approved by WCB. It is therefore an agency record that was created or obtained by the FCC and is under the agency's control. Therefore, we do not agree ... that Exemption 7(E) is inapplicable.¹⁵³

¹⁵² *Strike Force*, 2014 WL 3427571, at *2.

¹⁵³ *Riordan*, 22 FCC Rcd at 4318-19 (¶ 9) (quoting *Schools and Libraries Universal Service Support Mechanism*, 19 FCC Rcd 15808, 15810 (2004)) (footnotes omitted).

The fact that the Commission appointed or authorized USAC to administer the Telecom Program, and to review applications for funding, does not make USAC a federal agency under the FOIA. USAC is not a federal agency, primarily because Congress never authorized the Commission to establish USAC as such or to subdelegate any authority to USAC to administer any USF program. Because the *Riordan* line of cases were wrongly decided, the Commission should decide that USAC is not a federal agency for the purposes of the FOIA. It should hold that USAC could not withhold documents from ABS under FOIA.

III. DUE PROCESS AND THE EX PARTE RULES REQUIRED USAC TO GIVE ABS THE DOCUMENTS IT REQUESTED

USAC must abide by the Rules when it reviews applications in the course of its administration of the Telecom Program. *See Riordan*, 22 FCC Rcd at 4318 (¶ 9) (“USAC must act in accordance with the Commission’s orders, rules, and directives” when it “review[s] applications in the course of its administration of the program”). And USAC is obliged to ensure that the actions are in accordance with “all applicable law.” *Id.* Thus, USAC must comport itself in accordance with the “fundamental notions of fairness implicit in due process.” *Home Box Office v. FCC*, 567 F.2d 9, 56 (D.C.Cir.1977), *cert. denied*, 434 U.S. 829 (1977).

USAC knew, or should have known, that the documents that ABS requested had been submitted or issued in a contested “licensing” case under the APA¹⁵⁴ and a “restricted proceeding” under § 1.1208 of the Rules.¹⁵⁵ For example, the Windstream Appeal contained allegations that

¹⁵⁴ The APA defines “license” as “the whole or a part of an agency permit, certificate, approval, registration, charter, membership, statutory exemption or other form of permission.” 5 U.S.C. § 551(8). Had the RHCD granted their Form 465 applications, or approved funding for their FRNs, the HCPs would have received “licenses” under the APA. The RHCD’s decision to deny funding for the HCPs’ applications, and the appeal of that decision, constitutes “licensing,” which is an “agency process respecting the grant, renewal, denial, revocation, suspension, annulment, withdrawal, limitation, amendment, modification, or conditioning of a license.” *Id.* § 551(9).

¹⁵⁵ 47 C.F.R. § 1.1208 (2017). *See Change in Ex Parte Status of Requests for Review of USAC’s Decision*

were damaging to the reputation of ABS and Mr. Speck, and Windstream sought relief that, if granted, would be adverse to their interests. In particular, Windstream attempted to make ABS solely liable for any violation of the competitive bidding rules by claiming (falsely) that it was unaware that Mr. Speck was a consultant for the HCPs or that he was listed as a contact person on the Form 465s.

USAC should have recognized immediately that ABS had the right to respond to Windstream's contentions both as a matter of due process and elemental fairness. If that was not the case, USAC was put on notice of ABS' due process rights by the ABS Appeal. One of the four issues ABS raised was whether "the RHCD deprived ABS of its due process right to have access to the documentary evidence in the record."¹⁵⁶

The Commission's *ex parte* rules also entitled my clients to notice of what Windstream had argued to USAC in the Windstream Appeal, and a meaningful opportunity to rebut Windstream's evidence. The primary purpose of *ex parte* rules is to prevent "undisclosed communications that taint the fairness of the administrative process because they convey information to decision-makers that interested parties do not have the opportunity to rebut." *AT&T, Inc. and Deutsche Telekom AG*, 27 FCC Rcd 5618, 5620 (¶ 9) (2012). Since the purpose of the *ex parte* rules is "[t]o ensure the fairness and integrity of its decision-making," 47 C.F.R. § 1.1200(a) (2017), the Commission is "principally concerned about *ex parte* violations that deprive interested persons of notice and an opportunity to respond to the violator's presentations." *Ex Parte Complaint of Marcus Spectrum Solutions, LLC*, 26 FCC Rcd 2351, 2356 (¶ 15) (2011).

with Regard to the State of Tennessee's Request for Discounts Pursuant to § 254 of the Communications Act, 14 FCC Rcd 7707, 7707 (1999) ("These requests for review are restricted proceedings under the Commission's *ex parte* rules").

¹⁵⁶ ABS Appeal at 3.

Here, USAC should have been concerned that the Windstream Appeal was directed to the merits and outcome of the proceeding, but had not been served on ABS and Mr. Speck.

USAC displayed a callous disregard for due process and the ex parte rules below. In order to prevent USAC from disregarding due process in the future, the Commission should hold that USAC violated due process and the ex parte rules below.

IV. USAC ERRED BY NOT ADDRESSING THE ALLEGATION
THAT WINDSTREAM VIOLATED § 1.17 OF THE RULES

ABS obviously succeeded in raising a substantial and material question of fact with respect to whether Windstream violated § 1.17 of the Rules. Yet, USAC ignored the issue. The Commission must resolve the issue if it finds any merit to Windstream's argument that the Commission should recover funds solely from ABS. *See* COMADs Appeal at 13. The facts show that Windstream was involved in the alleged conflict of interest all along.

Respectfully submitted,

/s/ Russell D. Lukas

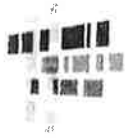
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August 28, 2018

EXHIBIT 1



Universal Service
Administrative Co.

Rural Health Care Division

Administrator's Decision on Rural Health Care Program Appeal

Via Electronic and Certified Mail

June 29, 2018

Mr. Russell D. Lukas
Mr. Jeffrey A. Mitchell
Lukas, Lafuria, Gutierrez & Sachs, LLP
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Cc: Ms. Darlene Flournoy
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Cc: Ms. Darlene Flournoy
UTHSCT on behalf of ETIHN – Andrews Center
1174 East Lennon Avenue
Emory, TX 75440

Re: ABS Telecom LLC - Appeal of USAC's
Decision for Funding Request Numbers and Applications Listed in
Appendices A and B

Dear Mr. Russell Lukas and Mr. Jeffrey Mitchell:

The Universal Service Administrative Company (USAC) has completed its evaluation of the May 12, 2017 letter of appeal (Appeal) submitted by Lukas, Lafuria, Gutierrez, & Sachs, LLP on behalf of ABS Telecom, LLC (ABS) and its Managing Partner, Mr. Gary Speck.¹ The applications and funding request numbers (FRNs) that are the subject of the Appeal are listed in Appendices A and B and were submitted under the federal Universal Service Rural Health Care Telecommunications Program (Telecom Program) on behalf of the following health care providers (HCPs): The Burke

¹ Letter from Russell D. Lukas and Jeffrey A. Mitchell, Lukas, Lafuria, Gutierrez & Sachs, LLP, on behalf of ABS Telecom, LLC, to Rural Health Care Division, USAC (May 12, 2017) (Appeal).

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Center – West Austin Street (Burke), Trinity Valley Community College (Trinity), and UTHSCT on behalf of ETIHN – Andrews Center (UTHSCT) (collectively, the Applicants).

On March 13, 2017, USAC denied all funding requests that arose from the FCC Forms 465 referenced in Appendices A and B, which covered funding years (FYs) 2012 through 2016.² ABS requests that USAC reverse its denials of the funding requests listed in the Appendices.³ Because ABS seeks a reversal of USAC's denial of funding, USAC considers ABS' request as an appeal submitted on behalf of the Applicants.

USAC has reviewed the Appeal and the facts related to this matter and has determined that Federal Communications Commission (FCC or Commission) rules and requirements support the denials of the FRNs listed in Appendices A and B because the Applicants' selection of Windstream Communications, LLC (Windstream) as the service provider for these funding requests was not the result of a fair and open competitive bidding process, and was therefore in violation of the Commission's requirements for the Telecom Program.⁴

Background

The Telecom Program provides eligible HCPs with universal service support for the difference between urban and rural rates for eligible telecommunications services, subject to limitations

² See Emails from Rural Health Care Division, USAC to Darlene Flournoy, The Burke Center – West Austin Street et al. (Mar. 13, 2017) (Administrator's Denials); Letter from Rural Health Care Division, USAC, to Darlene Flournoy, The Burke Center – West Austin Street et al. (Mar. 13, 2017) (Further Explanation of Decision).

³ See Appeal at 1, 11. ABS also requests that USAC grant ABS' request for certain documents it requested on April 27, 2017, upon which USAC based its decision. See Appeal at 10. Because ABS' subsequently submitted a Freedom of Information Act (FOIA) request for these documents to the FCC, which the FCC has since addressed and is under appeal, USAC does not address the request herein. See FOIA Request from Russell Lukas, Lukas, Lafuria, Gutierrez & Sachs, LLP, to FOIA Office, FCC (received May 24, 2017); Letter from Kirk S. Burgee to Russell Lukas, FOIA Control No. 2007-000672 (Sept. 8, 2017); Application for Review of Freedom of Information Action, Russell D. Lukas, Lukas, Lafuria, Gutierrez & Sachs, LLP, to FCC, FOIA Control No. 2007-000672 (Oct. 31, 2017); Amendment to Application for Review of Freedom of Information Action, Russell D. Lukas, Lukas, Lafuria, Gutierrez & Sachs, LLP, to FCC, FOIA Control No. 2007-000672 (May 17, 2018).

⁴ See *Requests for Review of Decisions of the Universal Service Administrator by Hospital Networks Management, Inc. Manchaca, Texas*, WC Docket No. 02-60, Order, 31 FCC Rcd 5731, 5733, para. 4 (2016) (*Hospital Networks Management Order*) (citing *Federal-State Joint Board on Universal Services*, CC Docket No. 96-45, Report and Order, 12 FCC Rcd 8776, 9076, para. 480 (1997) (*Universal Service First Report and Order*) (subsequent history omitted) (requiring competitive bidding processes to be fair and open such that no bidders receive an unfair advantage); *Promoting Telehealth in Rural America*, WC Docket No. 17-310, Notice of Proposed Rulemaking and Order, FCC 17-164, 2017 WL 6507162, at *28, para. 100 (2017) (*2017 RHC NPRM and Order*) (“[A] process that is not ‘fair and open’ is inherently inconsistent with ‘competitive bidding.’”). Cf. *Schools and Libraries Universal Service Support Mechanism*, CC Docket Nos. 96-45 et al., Third Report and Order and Second Further Notice of Proposed Rulemaking, 18 FCC Rcd 26912, 26939, para. 66 (2003) (*Schools and Libraries Third Report and Order*) (stating that a fair and open competitive bidding process is critical to preventing waste, fraud, and abuse of program resources). See generally, 47 C.F.R. 54.603(a).

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set forth in the Commission's rules.⁵ FCC rules require HCPs to competitively bid the requested services and select the most cost-effective method of providing the requested service.⁶ Specifically, each HCP must make a bona fide request for eligible services by posting an FCC Form 465 to USAC's website for telecommunications carriers to review.⁷ The HCP must review all bids submitted in response to the FCC Form 465 and wait at least 28 days before entering into a service agreement with the selected service provider.⁸

The FCC further requires that the competitive bidding process be fair and open, and that the process not be compromised by improper conduct by the applicant, service provider, or both parties.⁹ Accordingly, a service provider participating in the competitive bidding process cannot be involved in the preparation of the applicant's technology plan, FCC Form 465, request for proposal (RFP), or vendor selection process.¹⁰ Consultants or other parties working on behalf of the HCP who have an ownership interest, sales commission arrangement, or other financial stake with respect to a bidding service provider are also prohibited from performing any of those tasks on behalf of the HCP.¹¹ The FCC has further clarified that the individual listed as the contact person on the FCC Forms 465 may not be affiliated with a service provider that participates in the bidding process as a bidder.¹² As the FCC explained, the contact person can influence an applicant's competitive bidding process by controlling the dissemination of information regarding the services requested.¹³ For example, a contact person that has a relationship with a prospective service provider may discourage prospective bidders from submitting a bid, exclude prospective bidders from the bidding process altogether, or the contact person may not provide information to other bidders of the same type and quality that the contact person retains for its own use as a bidder.¹⁴

⁵ See 47 C.F.R. §§ 54.602(a), 54.604(b).

⁶ See 47 C.F.R. §§ 54.603(a), (b)(4), 54.615(a).

⁷ See 47 C.F.R. § 54.603; see also FCC Form 465, Health Care Providers Universal Service Description of Services Requested & Certification Form, OMB 3060-0804 (Nov. 2012) (*FCC Form 465*).

⁸ 47 C.F.R. § 54.603(b)(3).

⁹ *Hospital Networks Management Order*, 31 FCC Rcd at 5733, para. 4.

¹⁰ *Id.* (citing *Schools and Libraries Universal Service Support Mechanism and A National Broadband Plan for Our Future*, Sixth Report and Order, CC Docket 02-6, 25 FCC Rcd 18762, 18799-800, para. 86 (2010) (*Schools and Libraries Sixth Report and Order*) ("an applicant violates the Commission's competitive bidding rules if the applicant turns over to a service provider the responsibility for ensuring a fair and open competitive bidding process").

¹¹ *Hospital Networks Management Order*, 31 FCC Rcd at 5733-34, para. 4 (citing *Requests for Review of the Decision of the Universal Service Administrator by SEND Technologies, L.L.C.*, CC Docket No. 02-6, Order, 22 FCC Rcd 4950 (Wireline Comp. Bur. 2007) (*SEND Order*) (finding that where the applicant's contact person is also a partial owner of the selected service provider, the relationship between the applicant and the service provider creates a conflict of interest and impedes fair and open competition).

¹² *Id.* at 5742, para. 20 (citing *Schools and Libraries Sixth Report and Order*, 25 FCC Rcd at 18799-800, para. 86 ("an applicant violates the Commission's competitive bidding rules if the applicant turns over to a service provider the responsibility for ensuring a fair and open competitive bidding process"))).

¹³ *Id.* at 5740, para. 17 (citing *Request for Review by Mastermind Internet Services, Inc., et al.*, CC Docket No. 96-45, Order, 16 FCC Rcd 4028, 4033, para. 10 (2000) (*Mastermind Order*)).

¹⁴ *Id.*

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Further, the FCC has stated that any FCC Form 465 that lists as the contact person an employee or representative of a service provider that also participates in the bidding process as a bidder or is ultimately selected to provide the requested services is deemed defective and any funding requests arising from that form must be denied.¹⁵

Applicants' Funding Requests

Between April 20, 2012 and June 2, 2015, the Applicants submitted FCC Forms 465 requesting eligible services for FY 2015, which resulted in the selection of Windstream to provide service for the FRNs listed in the Appendices.¹⁶ The contact person listed on each of the FCC Forms 465 was Mr. Speck, an employee of ABS.¹⁷

Based on its review and investigation, USAC determined that the relationship between Windstream and Mr. Speck, the party who filed the FCC Forms 465 on behalf of the Applicants and whose employer, ABS, was listed as a vendor on at least one of the Applicants' service agreements with Windstream, created a conflict of interest that impaired the Applicants' ability to hold a fair and open competitive bidding process for the FRNs listed in the Appendices.¹⁸ Therefore, on March

¹⁵ *Hospital Networks Management Order*, 31 FCC Rcd at 5742, para. 20 (citing *Mastermind Order*, 16 FCC Rcd at 4032, para. 9). See also *Send Order*, 22 FCC Rcd at 4952-53, para. 3 ("[I]n the *Mastermind Order*, the Commission held that, where an FCC Form 470 lists a contact person who is an employee or representative of a service provider who participates in the competitive bidding process, the FCC Form 470 is defective."). In *Hospital Networks Management Order*, the FCC observed that the mechanics of the bidding processes in the rural health care and E-rate programs are effectively the same and that, like the FCC Form 470 in the E-rate program (i.e., the FCC Form inviting service providers to submit bids in response to an applicant's request for services), the rural health care program's FCC Form 465 describes the applicant's planned service requirements, as well as other information regarding the applicant and its competitive bidding process that may be relevant to the preparation of bids. See 31 FCC Rcd at 5741-42, para. 20.

¹⁶ See FCC Form 465 No. 43123237 for FY 2012 (Apr. 20, 2012); FCC Form 465 No. 43123240 for FY 2012 (Apr. 20, 2012); FCC Form 465 No. 43133868 for FY 2013 (May 16, 2013); FCC Form 465 No. 43144511 for FY 2014 (May 29, 2014); FCC Form 465 No. 43155659 for FY 2015 (June 1, 2015); FCC Form 465 No. 43155674 for FY 2015 (June 1, 2015); FCC Form 465 No. 43155889 for FY 2015 (June 2, 2015).

¹⁷ *Id.*

¹⁸ On December 23, 2016, USAC sent information requests to Windstream and the Applicants requesting clarification or additional information to address certain issues or deficiencies USAC identified in the funding requests listed in Appendix A. See Email from Jeremy Matkovich, Program Analyst, USAC, to Darlene Flournoy, ETIHN Coordinator, Burke Center, Trinity, UTHSCT (Dec. 23, 2016); Email from Jeremy Matkovich, Program Analyst, USAC, to Tim Loken, Director Regulatory Reporting, Windstream (Dec. 23, 2016). In its response to USAC's December 23, 2016 information request, Windstream indicated that its monthly recurring charges for each funding request included commissions paid to "Channel Partners" as compensation for identifying and bringing a customer to Windstream. See Letter from Tim Loken, Director Regulatory Reporting, Windstream, to USAC, at 1 (Jan. 6, 2017). According to Windstream's website, ABS Telecom, LLC was named one of Windstream's "Elite Channel Partners" in 2014. See Windstream Website, Windstream Names 2014 Elite Channel Partners, available at <http://news.windstream.com/news-releases/news-release-details/windstream-announces-2014-elite-channel-partners> (last visited May 17, 2018). Based on this information, USAC found that Mr. Speck's role as the contact person listed on the Applicants' FCC Forms 465 and affiliation with Windstream created a conflict of interest that tainted

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13, 2017, USAC denied the funding requests because the Applicants' selection of Windstream as the service provider for these funding requests was not the result of a fair and open competitive bidding process, in violation of the FCC's requirements.¹⁹

ABS' Appeal

On May 12, 2017, ABS appealed USAC's denials of the FRNs listed in the Appendices.²⁰ In the Appeal, ABS acknowledges that it had a business relationship with Windstream, arising from an agreement entered into in March 2011, under which ABS served as Windstream's "non-exclusive representative to solicit new business projects within Windstream's service area."²¹

Notwithstanding this relationship, ABS argues that: (1) the Applicants and ABS were only subject to the competitive bidding rules and certification requirements of Section 54.603 of the Telecom Program rules, which do not require that the competitive bidding process be fair and open;²² (2) neither the Applicants nor ABS violated any provision of Section 54.603 of the Telecom Program;²³ and (3) the Applicants did in fact conduct fair and open competitive bidding processes.²⁴ We address each of these arguments below.

ARGUMENT 1 – The Applicants and ABS were only subject to the competitive bidding and certification requirements of Section 54.603 of the Telecom Program rules, which do not require that the competitive bidding process be fair and open.

First, ABS argues that the Applicants and ABS were only subject to the competitive bidding and certification requirements set forth in Section 54.603 of the FCC's Telecom Program rules, which, unlike the Healthcare Connect Fund Program (HCF Program), do not require that the competitive bidding process be fair and open.²⁵ To support its assertion, ABS cites to the 2012 *HCF Order*, in which the FCC established the HCF Program and codified the fair and open competitive bidding requirements for that program.²⁶ ABS argues that in establishing the HCF Program, the FCC did not amend the competitive bidding requirements set forth in Section 54.603 of the Telecom

the competitive bidding process for each of the funding requests listed in the Appendices. *See Administrator's Denials; Further Explanation of Decision.*

¹⁹ *See Administrator's Denials; Further Explanation of Decision.* To the extent USAC provided funding for the FRNs listed in the Appendices, it sought recovery of those funds in a separate letter. *See Emails from Rural Health Care Division, USAC to Maribeth Everley, Windstream Communications, LLC (Oct. 23, 2017); Further Explanation of Decision at 2, nn. 2-3.*

²⁰ *See Appeal.*

²¹ *See id.* at 9; Attachment 3, Declaration, paras. 11-12.

²² *See Appeal* at 3-5.

²³ *See id.* at 5-8.

²⁴ *See id.* at 8-9.

²⁵ *See id.* at 3-5.

²⁶ *See generally Rural Health Care Support Mechanism*, WC Docket No. 02-60, Report and Order, 27 FCC Rcd 16678, 16678 (2012) (*HCF Order*).

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Program rules to require all entities participating in the Telecom Program to conduct a fair and open competitive bidding process; and, therefore, USAC must conclude that ABS was only subject to the competitive bidding and certification requirements set forth in Section 54.603 of the Telecom Program rules.²⁷

We reject ABS' arguments. Pursuant to Section 54.603 of the Telecom Program Rules, an HCP or an authorized agent acting on behalf of the HCP must certify, among other things, that: (1) the requester is a public or non-profit entity eligible to receive support; (2) the requester is physically located in a rural area; and (3) the requested service will be used solely for purposes reasonably related to the provision of health care services.²⁸ While USAC agrees that the Applicants and ABS acting on behalf of the Applicants are required to follow these certification requirements, USAC notes that the Applicants and ABS were also required to conduct a fair and open competitive bidding process pursuant to Telecom Program requirements.

Specifically, although the fair and open competitive bidding requirements have not been codified in existing Telecom Program rules, the FCC has consistently held that the competitive bidding process that results in the selection of a service provider in the Telecom Program must be fair and open.²⁹ The FCC also explicitly acknowledged in the *2017 NPRM and Order* that the proposed, formal adoption of rules codifying the fair and open standard for the Telecom Program, as proposed in the NPRM, would merely codify its existing competitive bidding requirements,³⁰ and noted that a process that is not "fair and open" is inherently inconsistent with "competitive bidding."³¹ Further, the Commission has applied the fair and open competitive bidding requirement in its decisions to determine whether the selection of an HCP's service provider in individual cases complied with Telecom Program requirements, despite the lack of a formal rule codifying this requirement.³² Therefore, USAC rejects ABS' argument.

ARGUMENT 2 – Neither the Applicants nor ABS violated any provision of Section 54.603 of the Telecom rules.

²⁷ Appeal at 4.

²⁸ 47 C.F.R. § 54.603.

²⁹ *Hospital Networks Management Order*, 31 FCC Rcd at 5733, para. 4 (citing *Mastermind Order*, 16 FCC Rcd at 4033, para. 10). See *id.* at 5731 ("The principles underlying the *Mastermind Order* and other orders addressing fair and open competitive bidding not only apply to the E-rate program (more formally known as the schools and libraries universal service program), but also to participants in the rural health care program.").

³⁰ See *2017 NPRM and Order* at 28, para. 100 ("Because we are merely proposing to codify an existing requirement, RHC Program participants that are already complying with our competitive bidding rules should not be impacted.").

³¹ *Id.* (citing *Universal Service First Report and Order*, 12 FCC Rcd 8776).

³² See, e.g., *Hospital Networks Management Order*, 31 FCC Rcd 5731 (finding a violation of the Commission's competitive bidding requirements where the Telecom Program applicant's competitive bidding process was not "fair and open"). See also *id.* at 5741, para. 18 n.84 (citing *Mastermind Order*, 16 FCC Rcd at 4032-33, para. 10 (concluding that a competitive bidding violation occurred despite the lack of a specific rule addressing the facts at issue)).

Second, ABS argues that neither the Applicants nor ABS violated any provision of Section 54.603 of the Telecom Rules, and states that USAC's finding that the Applicants' selection of Windstream as their service provider was not the result of a fair and open competitive bidding process is either irrelevant or immaterial.³³ Specifically, ABS asserts that Section 54.603 of the Telecom Program rules does not prohibit anyone from having a financial interest in the selection of a service provider or receiving a sales commission for any purpose; and, therefore, ABS could not have violated this section of the rules.³⁴

As an initial matter, USAC's denial of the funding requests listed in the Appendices was not based on a violation of Section 54.603 of the Telecom Program rules, but rather was based on a violation of the fair and open competitive bidding requirements, which, for the reasons stated above, apply to the Telecom Program and prohibit precisely the type of relationship the Applicants' contact person and ABS' employee, Mr. Speck, had with Windstream. As previously stated, the FCC requires that the competitive bidding process be fair and open.³⁵ Accordingly, consultants or other parties working on behalf of the HCP who have an ownership interest, sales commission arrangement, or other financial stake with respect to a bidding service provider are prohibited from being involved in the preparation of the applicant's technology plan, FCC Form 465, request for proposal (RFP), or vendor selection process.³⁶ The FCC has further clarified that the individual listed as the contact on the FCC Forms 465 may not be affiliated with a service provider that participates in the bidding process as a bidder.³⁷

Mr. Speck, by his own admission, acknowledges that he received sales commissions from Windstream for identifying and bringing new business customers to it and that he provided consulting services to the Applicants, which included, among other things, identifying potential service providers, preparing the FCC Forms 456 and 466, and assisting in the bid evaluation process.³⁸ It is precisely this type of relationship between an HCP's contact person and a service provider that is prohibited given the contact person's ability to influence an HCP's competitive bidding process by controlling the dissemination of information and potentially discouraging prospective bidders from submitting bids or excluding them from the process altogether.³⁹ Based on the record and application of FCC precedent, therefore, we affirm our determination that the

³³ Appeal at 5-8.

³⁴ *Id.* at 6.

³⁵ *Hospital Networks Management Order*, 31 FCC Rcd at 5733, para. 4.

³⁶ *Id.* (citing *Schools and Libraries Sixth Report and Order*, 25 FCC Rcd at 18799-800, para. 86 ("an applicant violates the Commission's competitive bidding rules if the applicant turns over to a service provider the responsibility for ensuring a fair and open competitive bidding process")).

³⁷ *Id.* at 5742, para. 20 (citing *Schools and Libraries Sixth Report and Order*, 25 FCC Rcd at 18799-800, para. 86 ("an applicant violates the Commission's competitive bidding rules if the applicant turns over to a service provider the responsibility for ensuring a fair and open competitive bidding process"))).

³⁸ Appeal at 9; Attachment 3, Declaration, paras. 9, 11-12.

³⁹ See *Hospital Networks Management Order*, 31 FCC Rcd at 5740 (citations omitted).

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Applicants' selection of Windstream as their service provider was not in compliance with the FCC's Telecom Program rules and requirements.

ARGUMENT 3 – The Applicants conducted fair and open competitive bidding processes.

Finally, ABS argues that the Applicants conducted fair and open competitive bidding processes.⁴⁰ To support its assertion, ABS notes that it had “non-exclusive agreements with all the telecommunications carriers, co-ops and cable companies that served northeast Texas, under which ABS would receive commissions for identifying and bringing a new business customer to the carriers;” and, as a result, did not stand to benefit from the selection of any particular service provider, “since it would be compensated by any service provider selected by the HCP.”⁴¹ ABS further states that all potential bidders were treated in the same manner and had the same opportunity to bid and that ABS “was not called upon to take part in a bid evaluation and selection process, because only Windstream tendered an actual bid.”⁴² Accordingly, ABS argues USAC must reverse its funding denials.⁴³

We do not concur with ABS' claim. As explained above, FCC rules and requirements prohibit consultants working on behalf of the HCP who have an ownership interest, sales commission arrangement, or other financial stake with respect to a bidding service provider from being involved in the preparation of the applicant's FCC Form 465 or vendor selection process, among other things.⁴⁴ Moreover, the individual listed as the contact on the FCC Forms 465 may not be affiliated with a service provider that participates in the bidding process as a bidder.⁴⁵ That ABS executed non-exclusive agreements with other service providers and that Windstream was the only provider to ultimately tender a bid does not change the nature of the relationship between Mr. Speck and Windstream, which created a conflict of interest that undermined the competitive bidding process for all FRNs at issue – a relationship expressly prohibited by the FCC's rules and requirements given the contact person's *ability* to influence an HCP's competitive bidding process by controlling the dissemination of information and potentially discouraging prospective bidders from submitting bids or excluding them from the process altogether.⁴⁶ Therefore, based on FCC

⁴⁰ Appeal at 8.

⁴¹ *Id.* at 9.

⁴² *Id.* at 10.

⁴³ *Id.*

⁴⁴ *Id.* (citing *Schools and Libraries Universal Service Support Mechanism and A National Broadband Plan for Our Future*, Sixth Report and Order, CC Docket 02-6, 25 FCC Rcd 18762, 18799-800, para. 86 (2010) (*Schools and Libraries Sixth Report and Order*) (“an applicant violates the Commission's competitive bidding rules if the applicant turns over to a service provider the responsibility for ensuring a fair and open competitive bidding process”).

⁴⁵ *Id.* at 5742, para. 20 (citing *Schools and Libraries Sixth Report and Order*, 25 FCC Rcd at 18799-800, para. 86 (“an applicant violates the Commission's competitive bidding rules if the applicant turns over to a service provider the responsibility for ensuring a fair and open competitive bidding process”).

⁴⁶ See *Hospital Networks Management Order*, 31 FCC Rcd at 5740 (citations omitted).

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precedent, we affirm our finding that Mr. Speck's dual role as the HCPs' consultant and Windstream's sales agent created a conflict of interest that impeded fair and open competition, in violation of the FCC's competitive bidding requirements.

Administrator's Decision on the Appeal

USAC is unable to grant the Appeal because Mr. Speck's dual role as a consultant for the Applicants and channel partner for Windstream created a conflict of interest that tainted the competitive bidding process for the FRNs listed in the Appendices. Therefore, because the competitive bidding process that resulted in the Applicants' selection of Windstream as the service provider for these funding requests was not fair and open, in violation of the FCC's rules and requirements,⁴⁷ USAC denies the Appeal.

If you wish to appeal this decision or request a waiver, you can follow the instructions pursuant to 47 C.F.R. Part 54, Subpart I (47 C.F.R. §§ 54.719 to 725). Further instructions for filing appeals or requesting waivers are also available at:

<http://www.usac.org/about/about/program-integrity/appeals.aspx>.

Sincerely,

/s/ Universal Service Administrative Company

⁴⁷ See *supra* note 4.



Appendix A

Appealed FY 2015 FRNs Included in USAC's Information Request⁴⁸

HCP NUMBER	HCP NAME	465 No.	FRN	SP NAME	Rural Rate	Urban Rate
33149	The Burke Center - West Austin Street	43144429	1580117	Windstream Communications, LLC	\$21,700.00	\$665.00
33149	The Burke Center - West Austin Street	43144429	1580118	Windstream Communications, LLC	\$21,700.00	\$665.00
33149	The Burke Center - West Austin Street	43144429	1580121	Windstream Communications, LLC	\$21,700.00	\$665.00
33149	The Burke Center - West Austin Street	43144429	1580122	Windstream Communications, LLC	\$21,700.00	\$665.00
33149	The Burke Center - West Austin Street	43144429	1580123	Windstream Communications, LLC	\$21,700.00	\$665.00
33149	The Burke Center - West Austin Street	43144429	1580124	Windstream Communications, LLC	\$21,700.00	\$665.00
33149	The Burke Center - West Austin Street	43144429	1580125	Windstream Communications, LLC	\$21,700.00	\$665.00
33149	The Burke Center - West Austin Street	43144429	1580126	Windstream Communications, LLC	\$21,700.00	\$665.00
33149	The Burke Center - West Austin Street	43144429	1580127	Windstream Communications, LLC	\$21,700.00	\$665.00

⁴⁸ See Email from Jeremy Matkovich, Program Analyst, USAC, to Darlene Flournoy, ETIHN Coordinator, Burke Center, Trinity, UTHSCT (Dec. 23, 2016); Email from Jeremy Matkovich, Program Analyst, USAC, to Tim Loken, Director Regulatory Reporting, Windstream (Dec. 23, 2016).

Appendix A

Appealed FY 2015 FRNs Included in USAC's Information Request⁴⁸

HCP NUMBER	HCP NAME	465 No.	FRN	SP NAME	Rural Rate	Urban Rate
33149	The Burke Center - West Austin Street	43144429	1580128	Windstream Communications, LLC	\$21,700.00	\$665.00
33149	The Burke Center - West Austin Street	43144429	1580129	Windstream Communications, LLC	\$21,700.00	\$665.00
33149	The Burke Center - West Austin Street	43144429	1580130	Windstream Communications, LLC	\$21,700.00	\$665.00
33149	The Burke Center - West Austin Street	43144429	1580131	Windstream Communications, LLC	\$21,700.00	\$665.00
33149	The Burke Center - West Austin Street	43144429	1580132	Windstream Communications, LLC	\$21,700.00	\$665.00
33149	The Burke Center - West Austin Street	43155674	1584689	Windstream Communications, LLC	\$22,870.00	\$665.00
26649	Trinity Valley Community College	43133868	1578411	Windstream Communications, LLC	\$20,000.00	\$665.00
26649	Trinity Valley Community College	43133868	1578412	Windstream Communications, LLC	\$47,963.97	\$665.00
26649	Trinity Valley Community College	43133868	1578413	Windstream Communications, LLC	\$33,350.34	\$665.00
26649	Trinity Valley Community College	43133868	1578414	Windstream Communications, LLC	\$3,526.50	\$665.00

Appendix A

Appealed FY 2015 FRNs Included in USAC's Information Request⁴⁸

HCP NUMBER	HCP NAME	465 No.	FRN	SP NAME	Rural Rate	Urban Rate
26649	Trinity Valley Community College	43133868	1578415	Windstream Communications, LLC	\$3,526.50	\$665.00
26649	Trinity Valley Community College	43144511	1578416	Windstream Communications, LLC	\$3,526.50	\$665.00
26649	Trinity Valley Community College	43144511	1578417	Windstream Communications, LLC	\$33,350.34	\$665.00
26649	Trinity Valley Community College	43144511	1578418	Windstream Communications, LLC	\$3,526.50	\$665.00
26649	Trinity Valley Community College	43123237	1578419	Windstream Communications, LLC	\$3,526.50	\$665.00
26649	Trinity Valley Community College	43123240	1578420	Windstream Communications, LLC	\$3,985.50	\$665.00
26649	Trinity Valley Community College	43155659	1578421	Windstream Communications, LLC	\$24,150.00	\$665.00
26649	Trinity Valley Community College	43155659	1580115	Windstream Communications, LLC	\$45,554.59	\$665.00
34447	UTHSCT on behalf of ETIHN - Andrews Center	43155889	1575203	Windstream Communications, LLC	\$51,000.00	\$665.00

Appendix A

Appealed FY 2015 FRNs Included in USAC's Information Request⁴⁸

HCP NUMBER	HCP NAME	465 No.	FRN	SP NAME	Rural Rate	Urban Rate
34447	UTHSCT on behalf of ETIHN - Andrews Center	43155889	1578408	Windstream Communications, LLC	\$51,000.00	\$665.00
34447	UTHSCT on behalf of ETIHN - Andrews Center	43155889	1578409	Windstream Communications, LLC	\$51,000.00	\$665.00
34447	UTHSCT on behalf of ETIHN - Andrews Center	43155889	1578410	Windstream Communications, LLC	\$51,000.00	\$665.00
34447	UTHSCT on behalf of ETIHN - Andrews Center	43155889	1584974	Windstream Communications, LLC	\$50,473.50	\$665.00

Appendix B

Appealed FY 2012 – 2016 FRNs

FY	HCP No.	HCP Name	FCC Form 465	FRN	SP Name	Estimated or Commitment Amount
2012	26649	Trinity Valley Community College	43123237	1210028	Windstream Communications, LLC	\$28,615.00

Appendix B

Appealed FY 2012 – 2016 FRNs

FY	HCP No.	HCP Name	FCC Form 465	FRN	SP Name	Estimated or Commitment Amount
2012	26649	Trinity Valley Community College	43123237	1210032	Windstream Communications, LLC	\$28,615.00
2012	26649	Trinity Valley Community College	43123240	1210038	Windstream Communications, LLC	\$33,205.00
2013	26649	Trinity Valley Community College	43123237	1332019	Windstream Communications, LLC	\$34,338.00
2014	33149	The Burke Center - West Austin Street	43144429	1456999	Windstream Communications, LLC	\$250,384.44
2014	33149	The Burke Center - West Austin Street	43144429	1457000	Windstream Communications, LLC	\$250,384.44
2014	33149	The Burke Center - West Austin Street	43144429	1457001	Windstream Communications, LLC	\$185,922.26
2014	33149	The Burke Center - West Austin Street	43144429	1457002	Windstream Communications, LLC	\$246,313.12
2014	33149	The Burke Center - West Austin Street	43144429	1457003	Windstream Communications, LLC	\$250,384.44
2014	33149	The Burke Center - West Austin Street	43144429	1457004	Windstream Communications, LLC	\$214,421.32
2014	33149	The Burke Center - West Austin Street	43144429	1457005	Windstream Communications, LLC	\$250,384.44
2014	33149	The Burke Center - West Austin Street	43144429	1457006	Windstream Communications, LLC	\$192,820.90

Appendix B

Appealed FY 2012 – 2016 FRNs

FY	HCP No.	HCP Name	FCC Form 465	FRN	SP Name	Estimated or Commitment Amount
2014	33149	The Burke Center - West Austin Street	43144429	1457007	Windstream Communications, LLC	\$250,384.44
2014	33149	The Burke Center - West Austin Street	43144429	1457008	Windstream Communications, LLC	\$192,820.90
2014	33149	The Burke Center - West Austin Street	43144429	1457010	Windstream Communications, LLC	\$214,421.32
2014	33149	The Burke Center - West Austin Street	43144429	1457011	Windstream Communications, LLC	\$180,493.97
2014	33149	The Burke Center - West Austin Street	43144429	1462644	Windstream Communications, LLC	\$250,384.44
2014	33149	The Burke Center - West Austin Street	43144429	1462646	Windstream Communications, LLC	\$155,659.00
2014	33149	The Burke Center - West Austin Street	43144429	1465687	Windstream Communications, LLC	\$72,604.62
2014	26649	Trinity Valley Community College	43123240	1455788	Windstream Communications, LLC	\$39,846.00
2014	26649	Trinity Valley Community College	43123237	1455793	Windstream Communications, LLC	\$34,338.00
2014	26649	Trinity Valley Community College	43133868	1455796	Windstream Communications, LLC	\$34,338.00
2014	26649	Trinity Valley Community College	43133868	1455797	Windstream Communications, LLC	\$232,020.00

Appendix B

Appealed FY 2012 – 2016 FRNs

FY	HCP No.	HCP Name	FCC Form 465	FRN	SP Name	Estimated or Commitment Amount
2014	26649	Trinity Valley Community College	43133868	1455798	Windstream Communications, LLC	\$34,338.00
2014	26649	Trinity Valley Community College	43133868	1456124	Windstream Communications, LLC	\$392,226.48
2014	26649	Trinity Valley Community College	43133868	1456125	Windstream Communications, LLC	\$567,587.64
2014	26649	Trinity Valley Community College	43144511	1456126	Windstream Communications, LLC	\$392,224.08
2014	26649	Trinity Valley Community College	43144511	1456997	Windstream Communications, LLC	\$538,675.08
2014	26649	Trinity Valley Community College	43144511	1456998	Windstream Communications, LLC	\$281,820.00
2014	26649	Trinity Valley Community College	43144511	1462637	Windstream Communications, LLC	\$34,338.00
2014	26649	Trinity Valley Community College	43144511	1462640	Windstream Communications, LLC	\$34,338.00
2015	26649	Trinity Valley Community College	43133868	1578414	Windstream Communications, LLC	\$34,338.00
2015	26649	Trinity Valley Community College	43133868	1578415	Windstream Communications, LLC	\$34,338.00
2015	26649	Trinity Valley Community College	43144511	1578416	Windstream Communications, LLC	\$34,338.00

Appendix B

Appealed FY 2012 – 2016 FRNs

FY	HCP No.	HCP Name	FCC Form 465	FRN	SP Name	Estimated or Commitment Amount
2015	26649	Trinity Valley Community College	43144511	1578418	Windstream Communications, LLC	\$34,338.00
2015	26649	Trinity Valley Community College	43155659	1578419	Windstream Communications, LLC	\$34,338.00
2015	26649	Trinity Valley Community College	43155659	1578420	Windstream Communications, LLC	\$39,846.00
2016	33149	The Burke Center - West Austin Street	43144429	1697877	Windstream Communications, LLC	\$252,420.00
2016	33149	The Burke Center - West Austin Street	43144429	1697940	Windstream Communications, LLC	\$252,420.00
2016	33149	The Burke Center - West Austin Street	43144429	1697941	Windstream Communications, LLC	\$252,420.00
2016	33149	The Burke Center - West Austin Street	43144429	1697946	Windstream Communications, LLC	\$252,420.00
2016	33149	The Burke Center - West Austin Street	43144429	1697947	Windstream Communications, LLC	\$252,420.00
2016	33149	The Burke Center - West Austin Street	43144429	1697948	Windstream Communications, LLC	\$252,420.00
2016	33149	The Burke Center - West Austin Street	43144429	1697949	Windstream Communications, LLC	\$252,420.00
2016	33149	The Burke Center - West Austin Street	43144429	1697953	Windstream Communications, LLC	\$252,420.00

Appendix B

Appealed FY 2012 – 2016 FRNs

FY	HCP No.	HCP Name	FCC Form 465	FRN	SP Name	Estimated or Commitment Amount
2016	33149	The Burke Center - West Austin Street	43144429	1697954	Windstream Communications, LLC	\$252,420.00
2016	33149	The Burke Center - West Austin Street	43144429	1697958	Windstream Communications, LLC	\$252,420.00
2016	33149	The Burke Center - West Austin Street	43144429	1697959	Windstream Communications, LLC	\$252,420.00
2016	33149	The Burke Center - West Austin Street	43144429	1697960	Windstream Communications, LLC	\$252,420.00
2016	33149	The Burke Center - West Austin Street	43144429	1697961	Windstream Communications, LLC	\$252,420.00
2016	33149	The Burke Center - West Austin Street	43144429	1697963	Windstream Communications, LLC	\$252,420.00
2016	26649	Trinity Valley Community College	43123237	1698106	Windstream Communications, LLC	\$34,338.00
2016	26649	Trinity Valley Community College	43133868	1698108	Windstream Communications, LLC	\$34,338.00
2016	26649	Trinity Valley Community College	43133868	1698110	Windstream Communications, LLC	\$232,020.00
2016	26649	Trinity Valley Community College	43133868	1698112	Windstream Communications, LLC	\$567,587.64
2016	26649	Trinity Valley Community College	43133868	1698118	Windstream Communications, LLC	\$392,224.08

Appendix B

Appealed FY 2012 – 2016 FRNs

FY	HCP No.	HCP Name	FCC Form 465	FRN	SP Name	Estimated or Commitment Amount
2016	26649	Trinity Valley Community College	43133868	1698121	Windstream Communications, LLC	\$34,338.00
2016	26649	Trinity Valley Community College	43144511	1698125	Windstream Communications, LLC	\$34,338.00
2016	26649	Trinity Valley Community College	43144511	1698130	Windstream Communications, LLC	\$392,224.08
2016	26649	Trinity Valley Community College	43144511	1698134	Windstream Communications, LLC	\$34,338.00
2016	26649	Trinity Valley Community College	43155659	1698138	Windstream Communications, LLC	\$281,820.00
2016	34447	UTHSCT on behalf of ETIHN - Andrews Center	43155889	1697880	Windstream Communications, LLC	\$604,020.00
2016	34447	UTHSCT on behalf of ETIHN - Andrews Center	43155889	1698227	Windstream Communications, LLC	\$604,020.00
2016	34447	UTHSCT on behalf of ETIHN - Andrews Center	43155889	1698229	Windstream Communications, LLC	\$604,020.00
2016	34447	UTHSCT on behalf of ETIHN - Andrews Center	43155889	1698230	Windstream Communications, LLC	\$604,020.00
2016	34447	UTHSCT on behalf of ETIHN - Andrews Center	43155889	1698233	Windstream Communications, LLC	\$597,702.00

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EXHIBIT 2

DECLARATION

I, Gary H. Speck, do hereby declare and state as follows:

1. I am the Managing Partner and Senior Design Engineer of ABS Telecom LLC ("ABS"). I have been a partner in ABS since July 2006. Prior to July 2006, I worked as a Technical Sales Engineer for AT&T (formerly SBC and Southwestern Bell Telecom) for four years, and as a Systems Engineer for McLeod USA for two years. I have 23 years of experience in the telecommunication industry. My technical certifications have included Cisco Certified Design Professional, Cisco Certified Network Professional, Microsoft Certified Systems Engineer, and Microsoft Certified Professional and Internet.

2. I am preparing this declaration to support the appeal that ABS plans to file with the Universal Service Administrative Co. ("USAC") seeking review of the decisions of its Rural Health Care Division ("RHCD") to deny all the funding requests that arose from the FCC Forms 465 ("Form 465s") that were filed on behalf of The Burke Center – West Austin Street ("Burke") and Trinity Valley Community College ("Trinity"), as well as the Form 465s that UTHSCT (University of Texas Health Science Center at Tyler) filed on behalf ETIHN (East Texas Interactive Healthcare Network) – Andrews (Andrews Center) ("UTHSCT"). Burke, Trinity, and UTHSCT were seeking universal service support for health care providers ("HCPs") under the FCC's Telecommunications Program ("Telecom Program"). I will refer to Burke, Trinity, and UTHSCT collectively as "the HCPs," or individually as a "HCP."

3. I have reviewed the material that Warren Lai of CFT Filings LLC emailed to Jeremy Matkovich of USAC on January 5, 2017 in response to Mr. Matkovich's request for information regarding Trinity (HCP 26649), Burke (HCP 33149), and UTHSCT (HCP 34447). The material included a document entitled "Response to USAC Inquiry dated 12/23/2016." I

have personal knowledge of the facts set forth in that document and I believe that they are true and correct. And because those facts are in the record before USAC, I will not repeat or address them in this declaration.

4. ABS is a network design and technology distribution company. We design telecom solutions for businesses and price them using our access to over 100 service providers nationwide. We price the solution across multiple vendors to obtain the best price and service level available for the customer. We present the options available to the customer, bring together the providers with the customers for contracting, and assist with the implementation of the solution and troubleshooting throughout the term of the contract between the customer and the service provider(s).

5. As I understand it, ETIHN was a project of the Northeast Texas Consortium of Colleges and Universities. ETIHN described itself as a voluntary collaboration of seven HCPs that serve 50 rural northeast Texas counties. It provided satellite teleconferences for nurses and physicians and continuing education for medical professionals in the rural communities. Trinity, Burke, Andrews Center, and UTHSCT were members of ETIHN. UTHSCT served as an agent and coordinator for ETIHN. My main contacts with ETIHN was its Director, Dr. Mickey Slimp, and its Coordinator, Darlene Flournoy.

6. In 2010, I learned that ETIHN desperately needed telecommunications facilities and services to deploy a network linking HCPs in northeast Texas. I met with Dr. Slimp and he explained the difficulty ETIHN was experiencing in finding telecommunications carriers willing to provide service to the small rural communities where the HCPs operated. I informed Dr. Slimp that ABS was a broker of telecommunications services and had relationships with almost every telecommunications service provider in northeast Texas (including regional cable

companies and regional co-ops) that was capable of providing the services and facilities that the HCPs would require. I told him that I could identify potential service providers that would potentially function as a patchwork of providers to provide a point to point data solution, and could provide engineering assistance to the HCPs based on my knowledge of existing fiber and points of presence in the region. I had just completed assisting the City of Rusk with the technical components of their 2010 grant application for the BTOP Program, and through that process had conducted extensive research into the providers and capabilities of those providers in the region.

7. During our conversations, I shared with Dr. Slimp my unique qualification as a regional expert, which included a vast knowledge of the assets, including the location of regional back haul/meet points, held by some of the smaller providers in the region that stemmed from my years at McLeod USA and AT&T. The East Texas telecommunications landscape is unique due to its patchwork of small local providers and LATAs. ETIHN had not been successful in obtaining services required in the region due to this disjointed structure and extreme rural locations. The geographical location of the HCP sites required circuits would likely cross a wide range of LATAs and incumbents.

8. As I understand it, prior to engaging my services, ETIHN had unsuccessfully searched for multiple years for providers willing to service these rural sites. Dr. Slimp initially provided a list of the potential sites to research for connectivity. This search was unsuccessful, as it had consistently been for ETIHN over the years. No providers were willing to do a capital outlay (CAPX) for build out, so the only remote possibility was an operations cost (OPEX) model with the cost included in the monthly recurring cost. The region had a large number of extreme remote low density areas, which present two difficulties to the service providers: (a)

lack of population density for future retail sales, and (b) extreme hardware and physical network equipment requirements (including routers, switches, long haul repeaters, right of way permits and taxes for using right of way, and fiber). The major telecom carrier models (AT&T, Verizon, Qwest, etc.) overcome this hurdle by using a rule of thumb of 250,000 people. If the 250,000 population density is not met, regional intra-LATA providers, co-ops and cable companies fill in gaps by providing subsets of service. These regional providers are small and can only provide a few options, like low speed internet or phone lines. The regional providers are essentially landlocked, as they don't have a path out of the LATA or LATAs they cover. This results in the last resort of extreme long distance data design called Back Haul to Meet Point, which is incredibly expensive, and likely cost prohibitive, for the customer. My extensive knowledge allowed me to request targeted individual case basis (ICBs) that were beyond the ability of the direct provider sales team, as well as offer technical guidance to the provider's internal engineering group during the process if requested. These regions require design solutions that include blended networks of regional (intra-LATA) and inter-LATA providers, a process that typically takes 6-12 months to complete and is extremely difficult to obtain provider to participate.

9. As I recall, I advised Dr. Slimp that the HCPs should consider applying for funding under the Telecom Program. I agreed that ABS would provide consulting services to ETIHN and the HCPs that would include: (a) identification of potential service providers; (b) general advice and guidance about the Telecom Program; (c) formulation of requests for proposals; (d) preparation and certification of the necessary Form 465s and the FCC Forms 466 ("Form 466"), 466-A ("Form 466-A") and 467 ("Form 467"); and (e) assistance in the bid evaluation process.

10. The HCPs authorized ABS in writing to act on their behalf before the FCC in matters related to the Telecom Program, to submit Form 465s, Form 466s, Form 466-As, and Form 467s to the RHCD on their behalf, and to make the certifications required by those forms.

11. I informed Dr. Slimp and the HCPs that ABS had non-exclusive agreements with all the telecommunications carriers, co-ops and cable companies that served northeast Texas, under which ABS would receive commissions for identifying and bringing a new business customer to the carriers. Dr. Slimp and the HCPs appreciated the fact that ABS could provide consulting services to them for a nominal fee, because ABS would be compensated by the service providers. Certainly, ABS's technology distribution agreements did not create a conflict of interest that could materially affect the competitive bidding process. ABS would not stand to benefit from the selection of any particular service provider, since it would be compensated by any service provider selected by the HCP.

12. In March 2011, ABS entered into a dealer agreement with Windstream Communications, Inc. ("Windstream") and its affiliates under which ABS would serve as Windstream's non-exclusive representative to solicit new business projects within Windstream's service area. In 2010, Windstream had acquired Q-Comm, of which wholesale/retail provider Kentucky Data Link was an asset but not yet incorporated into the Windstream design model. The fiber routes owned by Kentucky Data Link closely matched the HCPs desired routes between LATAs and carriers, co-ops and cable companies. Entering into the Windstream dealer agreement was the only way to explore the option of utilizing those routes. The agreement and any services provided to business customers solicited by ABS were to be governed by Windstream's tariffs and price lists on file with federal and state regulatory agencies. Windstream was to pay ABS a commission for new projects that it had solicited.

13. To the best of my knowledge, the HCPs always complied with the Telecom Program's competitive bidding and certification requirements.

14. Each one of the HCPs participated in a competitive process by completing Form 465s that I signed, certified, and submitted to the RHCD. In each instance, I certified that that the HCP was: (a) a public or non-profit entity; (b) either a community mental health center or a post-secondary educational institution offering health care instruction, including a teaching hospital or medical school; and (c) physically located in a rural area. I also certified that the requested services would be used by the HCP solely for purposes reasonably related to the provision of health care services or instruction that the HCP was legally authorized to provide under Texas law, and that the services would not be sold, resold or transferred by the HCP in consideration of money or any other thing of value.

15. The RHCD posted all reviewed and approved Form 465s that I submitted on its website. After the Form 465 was posted, the RHCD sent confirmation of the posting to the HCP. The HCPs always waited at least 28 days from the date on which their Form 465s were posted on the RHCD's website before making a commitment with Windstream, the only service provider that submitted a bid to them.

16. After one of the HCPs selected Windstream to be its service provider, I signed, certified, and submitted a Form 466 to the RHCD. In particular, I certified to the RHCD that the HCP had selected the most cost-effective method of providing the requested services, where the most cost-effective service was defined as the service available at the lowest cost after consideration of the features, quality of transmission, reliability, and other factors that the HCP deemed necessary for the service to adequately transmit its health care services.

17. I was able to certify that the HCPs had selected the most cost-effective service available, because I knew that there was no other service available. Windstream was the only carrier that was willing to provide the point to point data services that the HCPs needed.

18. Prior to each competitive bid process, ABS and the HCP solicited interest in bidding from all carriers that had the capacity to provide the services that the HCP was considering to determine if there was a viable service solution. These carriers included ACC Business, Zayo Group, Nitel, Suddenlink Business, and Windstream.

19. During each competitive bid process, ABS provided exactly the same information to each potential service provider, and it responded in a timely manner to any follow-up questions from potential bidders. ABS never did anything to discourage or prevent a potential service provider from submitting a bid. Nor did it do anything that could have discouraged or prevented a service provider from bidding.

20. As it turned out, ABS played a purely administrative role in the competitive bidding processes. It was not called upon to take part in a bid evaluation and selection process for the simple reason that only Windstream tendered an actual bid. If a competing service provider *had* tendered a lower bid than Windstream's, such a bidder would have been selected by the HCP.

21. Throughout the entire process, Windstream was aware that ABS was both one of its so-called "Channel Partners" and a consultant for the HCPs.

22. ABS was not involved in the negotiation of the contracts that the HCPs executed with Windstream. Under its agreement with ABS, Windstream was to provide service to the HCPs either at its tariffed rates or in accordance with its price lists.

23. The RHCD found that my role as the contact person listed on the Form 465s and ABS' relationship with Windstream undermined the "fair and open" competitive bidding processes that lead to the selection of Windstream as the service provider. Based on its erroneous finding of fact that I had a "conflict of interest" that allegedly violated the FCC's rules, the RHCD deemed the Form 465s to be "defective" and it denied all the associated funding requests. The RHCD's action led the HCPs to terminate their relationships with ABS, and the RHCD's finding that ABS was involved in conduct that violated the FCC's rules has severely damaged its professional reputation in northeast Texas where it does business.

I declare under penalty of perjury that the foregoing is true and correct. Executed on May 10, 2017.

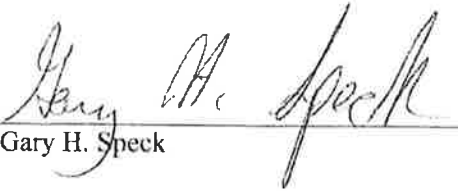

Gary H. Speck

EXHIBIT 3

DECLARATION

I, Charles Bates, do hereby declare and state as follows:

1. I was employed as a Channel Sales Manager for Windstream Communications ("Windstream") from September 2010 through December 2014. My assigned region at Windstream included the Southwest states. I established a new sales relationship with ABS Telecom, LLC ("ABS") in 2011, and continued to serve as the Windstream Channel Manager assigned to ABS until my departure from Windstream in December 2014. I have been employed in the industry as a Channel Manager for 13 years.

2. I am preparing this declaration to support the appeal that ABS has filed with the Universal Service Administrative Co. ("USAC") seeking review of the decisions of its Rural Health Care Division ("RHCD") to deny all the funding requests that arose from the FCC Forms 465 ("Form 465s") that were filed on behalf of The Burke Center – West Austin Street ("Burke") and Trinity Valley Community College ("Trinity"), as well as the Form 465s that UTHSCT (University of Texas Health Science Center at Tyler) filed on behalf ETIHN (East Texas Interactive Healthcare Network) – Andrews (Andrews Center) ("UTHSCT"). Burke, Trinity, and UTHSCT were seeking universal service support for health care providers ("HCPs") under the FCC's Telecommunications Program ("Telecom Program"). I will refer to Burke, Trinity, and UTHSCT collectively as "the HCPs," or individually as a "HCP."

3. In February 2011, I contacted Gary Speck with ABS to try to establish a new channel sales relationship. In the course of the conversation about the services I could offer through Windstream, Gary Speck mentioned a potential project in a rural region that he had been unable to find a provider to service. The project was for the ETIHN. As I understand it, ETIHN was a project of the Northeast Texas Consortium of Colleges and Universities. ETIHN

described itself as a voluntary collaboration of seven HCPs that serve 50 rural northeast Texas counties. It provided satellite teleconferences for nurses and physicians and continuing education for medical professionals in the rural communities. Trinity, Burke, Andrews Center, and UTHSCT were members of ETIHN. UTHSCT served as an agent and coordinator for ETIHN. My main contacts with the ETIHN was its Director, Dr. Mickey Slimp, and its Coordinator, Darlene Flourney.

4. Through multiple telephone calls and emails in February and March 2011, Gary Speck provided site information for the initial project, Trinity, and requested verification that Windstream would be interested in bidding on a project under the Telecom Program. He informed me that Kentucky Data Link ("KDL"), a recent acquisition of Windstream, covered nine of the 16 original sites provided by the HCP, which put Windstream in a unique position of owning assets capable of servicing the needs of the HCP. Prior to exploring the specific opportunity and submitting information internally for pricing or engineering, Gary Speck requested that I obtain approval from Windstream's legal department that we could proceed with this opportunity through Windstream's Channel Program. Gary Speck informed me that ABS, in their role as Consultant for the HCP in the Telecom Program, would be filing the required FCC Forms 465s, 466s and 467s. Gary Speck also repeatedly told me that the project would be submitted for open bidding through the USAC website, and that the winning bid would be selected based on lowest price. I was aware that Windstream would only receive the contracts for service if they were selected as the lowest bidder after the 28-day open bid window.

5. In February 2011, I spoke with my supervisor Michelle Kadlacek, AVP of Indirect Sales, about the opportunity. We contacted an attorney in Windstream's legal department who was designated to handle USAC issues and explained the opportunity and ABS's

involvement. We informed Windstream's attorney that ABS would be serving as Consultant for the HCP and as such, would be filing the documentation with USAC on behalf of the HCP. We shared all the information that had been provided by ABS regarding the opportunity and the process. After reviewing all the information and responding to all questions from Windstream's legal department, we were given their authorization to proceed with bidding on the opportunity.

6. In March 2011, ABS entered into a dealer agreement with Windstream and its affiliates under which ABS would serve as Windstream's non-exclusive representative to solicit new business projects within Windstream's service area. Windstream was to pay ABS a commission for new projects that it had solicited.

7. During the first week of May 2011, Gary Speck informed me that he had filed the initial Form 465 for the HCP, provided the HCP and filing numbers so that we could track the Form 465, and confirmed the open bid window had begun. I obtained quotes from our internal engineering department and submitted a bid for the services on behalf of Windstream. I was informed that Windstream was awarded the contracts after the open bid window ended.

8. In June 2011, Windstream's legal department began direct contract negotiations with Dr. Slimp and the HCP's attorneys. Windstream's legal department worked directly with the HCP's attorneys for nine months to draft a mutually acceptable contract form. The first set of the contracts for the HCP were signed on March 19, 2012.

9. On December 13, 2011, Michelle Kadlacek and I traveled to Tyler to meet with Dr Slimp and Gary Speck to discuss Windstream's interest in obtaining the business. During the course of that meeting, Gary Speck informed Dr. Slimp that he would be filing the documents with USAC on their behalf, and that he would be paid by Windstream as a channel partner.

10. Throughout the entire process, Windstream was aware that ABS was both one of its so-called "Channel Partners" and a consultant for the HCPs.

11. Gary Speck specifically informed me and my supervisors at the beginning of each open bid for the HCPs that the Form 465 Windstream was considering bidding on had been submitted to USAC by him in his role as Consultant for the HCP. My supervisors and I were aware that he would be receiving and reviewing all bids on behalf of the HCPs.

12. ABS was not involved in the negotiation of the contracts that the HCPs executed with Windstream. Under its agreement with ABS, Windstream was to provide service to the HCPs either at its tariffed rates or in accordance with its price lists.

I declare under penalty of perjury that the foregoing is true and correct. Executed on September 12, 2017.


Charles Bates

EXHIBIT 4

DECLARATION

I, Gary H. Speck, do hereby declare and state as follows:

1. I am the Managing Partner and Senior Design Engineer of ABS Telecom LLC ("ABS"). I have been a partner in ABS since July 2006.

2. I am preparing this declaration to refute statements asserted in the appeal documents ("Appeal") filed by Windstream Communications, Inc. ("Windstream") on May 11, 2017 the Universal Service Administrative Co. ("USAC") seeking review of the decisions of its Rural Health Care Division ("RHCD") to deny all the funding requests that arose from the FCC Forms 465 ("Form 465s") that were filed on behalf of The Burke Center – West Austin Street ("Burke") and Trinity Valley Community College ("Trinity"), as well as the Form 465s that UTHSCT (University of Texas Health Science Center at Tyler) filed on behalf ETIHN (East Texas Interactive Healthcare Network) – Andrews (Andrews Center) ("UTHSCT"). Burke, Trinity, and UTHSCT were seeking universal service support for health care providers ("HCPs") under the FCC's Telecommunications Program ("Telecom Program"). I will refer to Burke, Trinity, and UTHSCT collectively as "the HCPs," or individually as a "HCP."

3. ABS filed an appeal on May 12, 2017 with USAC seeking review of the decisions of its RHCD to deny funding to the HCPs. I provided a declaration that was filed in support of ABS' appeal. Because the facts set forth in my prior declaration are in the record before USAC, I will not repeat or address them in this declaration.

4. I have reviewed the Declaration of Charles Bates dated September 12, 2017. I have personal knowledge of the facts set forth in that document and I believe that they are true and correct.

5. I established my sales relationship with Windstream in February 2011. My Channel Manager with Windstream was Charles Bates. He served as my Channel Manager until December 2014, when I was reassigned to Zachary Mungeer. As Channel Manager, Mr. Bates served as my primary contact with Windstream. In February 2011, I spoke with him about the initial sites for the HCP, and requested he determine if Windstream would consider participating in a project through the Telecom Program. From the genesis of this relationship, Windstream was aware of ABS' role as consultant for the HCPs. (Attachment A)

6. Through conversations and emails with Mr. Bates in February and March 2011, I provided site lists, disclosed my role as consultant for the HCPs and explained that I had been unable to find other providers to consider servicing the sites due to their rural location. I provided an overview of the Telecom Program. I disclosed that as the consultant, I would be filing all the documentation with the Telecom Program on behalf of the HCPs. I also outlined the open bidding process, and informed him that I would be accepting bids from any provider who expressed interest. I also explained the selection criteria demanded that the lowest bid win the contract, and that Windstream could submit a bid but would not win the business if it was not the lowest price. I requested that Mr. Bates discuss this matter with his internal supervisors and legal teams to make sure he had approval for the project to move forward before many hours were invested in exploring Windstream's participation.

7. In early March 2011, Mr. Bates informed me that Windstream Legal had reviewed his request and approved the project. ABS subsequently entered into a channel partner agreement with Windstream on or about March 15, 2011, under which ABS would serve as a non-exclusive representative of Windstream. ABS would be paid a commission on any new business that it brought to Windstream.

8. The Dealer Agreement (or "channel partner agreement") between ABS and Windstream contained the following provision:

Dealer shall comply with all laws, rules and regulations applicable to Dealer's or Windstream's business and Dealer's performance of its services hereunder. Dealer shall promptly Windstream with all information which Windstream may request from time to time in connection with Dealer's obligations under this Agreement. Dealer shall not make any representations or warranties regarding the Services provided by Windstream.

9. ABS never breached its agreement with Windstream. At all times, ABS complied with all laws, rules and regulations applicable to its business or that of Windstream. In particular, ABS never violated the competitive bidding and certification requirements of Section 54.603 of the FCC's rules. That rule did not prohibit ABS from serving as a consultant for an HCP at the same time it was one of Windstream's "channel partners."

10. On or about May 5, 2011, I informed Mr. Bates that the Form 465 opening the Telecom Program's competitive bidding window had been approved and was now posted by RHCD. I requested that Mr. Bates submit a bid for the services listed during the open bid period, and provided the HCP number and Form 465 filing numbers assigned by the Telecom Program for tracking and his internal capture of the business. I reiterated that his bid would only be selected if it was the most cost effective bid. At the expiration of the open bid period, Windstream was the only provider who had expressed an interest in bidding on the project.

11. On December 13, 2011, I traveled to Tyler, Texas to introduce Mr. Bates and his supervisor, Michelle Kadlacek, to Dr. Mickey Slimp, the HCP representative for the project. Our conversation included a discussion of the role each party in the process and outlined the filings that ABS had already filed and anticipated filing with RHCD, namely Forms 465, 466s and 467s. I also repeated the disclosures to the HCP that ABS would be compensated by Windstream as a sales agent in the form of commissions on the contract value.

12. Windstream and the HCP signed the first contracts for the Telecom Program in March 2012 after their legal representatives worked together for nine months to reach a mutually acceptable contract. I was not a party to any of those negotiations, nor was I a party to the contracts.

13. It was my practice to notify my Windstream channel manager (initially Mr. Bates, and subsequently Mr. Mungeer) by telephone or email when I filed the Form 465 so they could locate the form on the RHCD site and consider bidding on the listed locations (Attachment B). My channel manager was directly informed that ABS was initiating the open bid period with the Form 465 in its role as consultant for the HCP. My channel manager was also informed that it was a competitive bidding process, that Windstream was simply being considered for the project, and that it was not guaranteed of being selected by the HCP. I disclosed each time that if multiple bids were submitted, the winning bid would be selected based on price after the end of the open bid period.

14. As it turned out, ABS played a purely administrative role in the competitive bidding processes. It was not called upon to take part in a bid evaluation and selection process for the simple reason that only Windstream tendered an actual bid. If a competing service provider *had* tendered a lower bid than Windstream's, such a bidder would have been selected by the HCP.

15. Under the terms of ABS' channel partner agreement with Windstream, ABS received commissions in the amount of 16% on monthly recurring revenue from contacts attributable to ABS prior to July 1, 2015, not 20% as stated in the Appeal. (Attachment C)

16. In January 2015, ABS was engaged by Hunt Regional Emergency Medical Center ("Hunt") as a consultant to act on their behalf in the Telecom Program. On or about February

11, 2015, I filed the Form 465 and it was posted by RHCD. Windstream bid on the sites listed for service, and was the only bid received. As the only bidder, Windstream was awarded the contracts. As part of the contract negotiations between Hunt and Windstream, Hunt requested an addendum ("Addendum") that outlined additional terms. Pursuant to Windstream's request, I provided a draft of some sample language that was requested by Hunt. (Attachment D) Mr. Mungeer, my assigned channel manager at that time, took the draft and terms to Windstream's legal department for review and approval. On March 30, 2015, Mr. Mungeer sent me a copy of the final Addendum, which had been rewritten and approved by Windstream's legal department. Such Addendum, executed by Windstream on April 8, 2015, states that ABS would "submit to the Rural Healthcare Program the documentation required to obtain the difference between the Rural and Urban Rates." (Attachment E) James E. Pearce, a member of Windstream's executive team, was copied on that email with the attached Addendum.

17. The terms in the Addendum were repeated in documents prepared for the addition of two more Hunt sites in February and March 2016.

18. In August 2017, Hunt representatives emailed to me a copy of correspondence they had received from USAC regarding a review of their Form 465 filings, as well as the responses filed by Windstream (Attachment F). In response to inquiries into the January 16, 2016 Form 465 Application Number 43160643, Mr. Loken, Director of Regulatory Reporting, stated that Windstream had become aware that ABS may have been acting as a consultant for another customer around that time. Mr. Loken also stated that at the time of bidding, Windstream's government support team understood that Hunt had engaged PEM Filings as their consultant.

19. I submitted the Form 465 for Hunt on January 16, 2016. I subsequently called Mr. Mungeer, who was ABS's Windstream channel manager, and told him that I had submitted the Form 465 for Hunt, and I asked that Windstream bid on the Hunt project. Since he had been ABS' channel manager since late 2014, Mr. Mungeer obviously knew that I represented a Windstream channel partner.

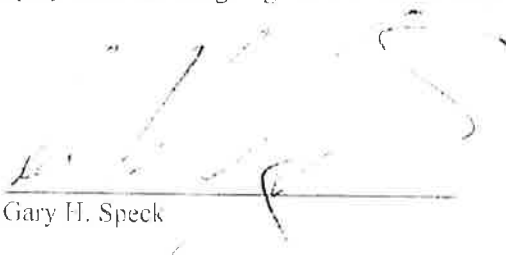
20. Throughout the relationship with Hunt, Windstream employees were aware of my role as consultant for Hunt. I repeatedly explained to my sales manager that I was filing the Form 465s, and as the consultant, would be unable to discuss pricing or provide information on any other bids received during the competitive bid window. I was not privy to Windstream's internal processes and, therefore, I cannot address what departments Mr. Mungeer engaged to review the Hunt bid, nor the information he presented to them.

21. In May 2016, ABS sent a letter to Windstream seeking rescission of the termination letter dated April 19, 2016, asserting that ABS did not violate the terms of its Dealer Agreement. ABS advised Windstream in its letter on May 18, 2016 that ABS had transferred all consulting services for the Telecom Program to an unrelated third party in an effort to reach a mutually agreeable solution and to avoid any perceived or actual organizational conflicts of interest in future dealings.

22. As late as September 14, 2016, Windstream was willing to reinstate ABS as a "Channel Partner" so long as ABS indemnified Windstream in the amount of \$5 million. However, Windstream did not agree that ABS should also continue to serve the HCP as a sales agent. (Attachment G)

23. Throughout the entire process, Windstream was aware that ABS was both one of its so-called "Channel Partners" and a consultant for the HCPs.

I declare under penalty of perjury that the foregoing is true and correct. Executed on
September 20, 2017.



Gary H. Speck



Amy Speck <amy@abstelecom.net>

Charles as the Attorney completes the review we have project that needs attention

2 messages

Gary Speck <gary@abstelecom.net>

Mon, Feb 28, 2011 at 4:02 PM

To: "Bates, Charles" <Charles.Bates@windstream.com>

Cc: "Wornack, Beth" <beth@abstelecom.net>, Gary Speck <Gary@abstelecom.net>

Charles,

ABS Telecom LLC has been retained to solicit bids for a large rural Medical Training network. of the 16 sites Wind stream (KDL) covers 9 . Can you start the bid process Now? on the 15th march i will not be able to give any guidance on pricing ETC. But if we have a design and price structure in place before the 15th we only have to wait for 28 bid period to end. Attached is the site list as well as the Ethernet Speeds for the remotes.

Gary Speck
Business Development
O) 972-407-0063
F) 214-291-5901
Gary@abstelecom.net
www.abstelecom.net

NETnet Rural Health Site Information 022511.xls
70K

Bates, Charles <Charles.Bates@windstream.com>
To: Gary Speck <gary@abstelecom.net>

Tue, Mar 1, 2011 at 9:30 AM

Charles Bates
District Dealer Manager
Charles.bates@windstream.com
Cell – 281-900-4667
Fax- 864-335-0682

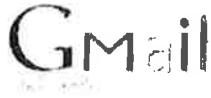
From: Gary Speck [mailto:gary@abstelecom.net]
Sent: Monday, February 28, 2011 4:03 PM
To: Bates, Charles
Cc: Womack, Beth; Gary Speck
Subject: Charles as the Attorney completes the review we have project that needs attention

[Quoted text hidden]

The information contained in this message, including attachments, may contain privileged or confidential information that is intended to be delivered only to the person identified above. If you are not the intended recipient, or the person responsible for delivering this message to the intended recipient, Windstream requests that you immediately notify the sender and asks that you do not read the message or its attachments, and that you delete them without copying or sending them to anyone else.

8/15/2017

ATTACHMENT B



Amy Speck <amy@abstelecom.net>

Hunt Regional Emergency Medical Center at Quinlan

1 message

Amy Speck <amy@abstelecom.net>

Thu, Feb 12, 2015 at 6:30 PM

To: "Mungeer, Zachary William" <Zachary.Mungeer@windstream.com>, Jason.Dishon@windstream.com,
George.Easley@windstream.com

Cc: Gary Speck <Gary@abstelecom.net>

The Form 465 for Hunt Regional at Quinlan was submitted to the RHC today. They assigned HCP# 42055 to the site. Please make sure you capture this project as an ABS Telecom project. Gary has already had this design approved and Zachary has ICB pricing.

Thank you.

Best,
Amy Speck
ABS Telecom LLC

windstream.

AMENDED COMMISSION PLAN

This amended commission plan becomes effective on July 1, 2015 ("Effective Date") and hereby supersedes all prior commission plans and/or agreements, including but not limited to any Exhibit A or Exhibit B with regard to the Channel Partner Agreement. Any reference in the Channel Partner Agreement to prior commission plan exhibits shall hereby be made solely to this amended commission plan.

Standard CP Commissions

For all sales obtained on or prior to the Effective Date that are included in Channel Partner's "FF16" comp plan and any additional services added to those existing accounts or existing service addresses ("Existing Sales"), Channel Partner will receive a commission rate of sixteen percent (16%) on Monthly Billed Revenue, except for Hosted Solutions Services (including UCaaS), which shall be paid to qualifying CPs at a commission rate of fifteen percent (15%) on Monthly Billed Revenue * and 3% on CPE NRCs **.

Notwithstanding the foregoing or any other terms in this commission plan, in the event that the total Monthly Billed Revenue derived from Channel Partner's Existing Sales decreases to an amount less than \$100,000.00, Channel Partner's commission based on Existing Sales will decrease in accord with the following table:

Monthly Billed Revenue	Commission Rate All Services Except CPE & WHS
\$5,000 – \$14,999	11%
\$15,000 – \$29,999	12%
\$30,000 – \$49,999	13%
\$50,000 – \$74,999	14%
\$75,000 – \$99,999	15%
\$100,000 – \$124,999	16%
\$125,000 – \$149,999	17%
\$150,000 – \$174,999	18%
\$175,000 – \$224,999	19%
\$225,000+	20%

For all Monthly Billed Revenue derived from sales to net new accounts with new service addresses that are obtained after the Effective Date ("New Sales") for so long as the total Monthly Billed Revenue derived from both Existing Sales and New Sales is aggregately greater than \$225,000.00, Channel Partner will receive a commission rate of twenty percent (20%) on Monthly Billed Revenue, specifically derived from New Sales, except CPE and Hosted Solutions Services (including UCaaS), which shall be paid at a commission rate of fifteen percent (15%) on Monthly Billed Revenue * and 3% on CPE NRCs **.

In the event that the total Monthly Billed Revenue derived from both Existing Sales and New Sales in the aggregate decreases to an amount less than \$225,000.00, Channel Partner's commission based on New Sales will decrease in accord with the above table.

* Monthly Billed Revenue is defined as net charges for Services invoiced to a customer by Windstream during a one month period relating to Services sold by CP in accordance with this Agreement (excluding taxes, pass through surcharges, termination charges and other fixed monthly service fees). In addition, for Hosted Solutions Services or Collocation Services, Monthly Billed Revenue does not include any usage-based charges.

** CPE NRCs only include the one-time charges for CPE and do not include taxes, termination charges, maintenance plans and their associated charges, and other fixed monthly service fees but instead shall be only the base charge for CPE. In no event shall the commissions paid by Windstream for a particular account for CPE sales be paid unless the margin on such sale is greater than 20%, unless otherwise approved in writing on an individual case basis by the Director of Channel Marketing at Windstream. For clarity, CPE NRCs do not count toward the MBR thresholds.

By

Name

Title

Date

CHANNEL PARTNER

Gary H. Spivey
Managing Partner
7/12/15

WINDSTREAM

Name

Title

Date

Jay D. Dixon
Channel Conf
8/10/15

**Letter of Memorandum and Understanding
(Business Agreement)**

This business agreement pertains to and involves the following parties:

Windstream
16479 Dallas Parkway
Addison, TX 75001

ABS Telecom LLC
6505 W. Park Blvd.
Suite 306, # 130
Plano, TX 75093

Hunt Regional Medical Center
4215 Joe Ramsey Blvd
Greenville, TX 75401

This business agreement applies to following proposals for a term of 60 months:

Proposal: 353366
Opportunity ID: 427160

Hunt Regional Medical Center is responsible to pay directly to Windstream the equivalent of the Urban Rate (\$665/month). ABS Telecom will submit to the Rural Healthcare program the documentation required to obtain the difference between the Urban Rate and the Rural Rate (\$46,338.60/month). Such amounts would be paid directly to the carrier from the RHC program. Hunt Regional must respond within a 2 day window to all RHC program related requests from the USAC, PQA, ABS Telecom and/or Windstream or this Business Agreement is void.

Proposal: 353368
Opportunity ID: 427174

Hunt Regional Medical Center is responsible to pay directly to Windstream the equivalent of the Urban Rate (\$665/month). ABS Telecom will submit to the Rural Healthcare program the documentation required to obtain the difference between the Urban Rate and the Rural Rate (\$41,626.20/month). Such amounts would be paid directly to the carrier from the RHC program. Hunt Regional must respond within a 2 day window to all RHC program related requests from the USAC, PQA, ABS Telecom and/or Windstream or this Business Agreement is void.

Proposal: 353370
Opportunity ID: 427194

Hunt Regional Medical Center is responsible to pay directly to Windstream the equivalent of the Urban Rate (\$665/month). ABS Telecom will submit to the Rural Healthcare program the documentation required to obtain the difference between the Urban Rate and the Rural Rate (\$40,055.40/month). Such amounts would be paid directly to the carrier from the RHC program. Hunt Regional must respond within a 2 day window to all RHC program related requests from the USAC, PQA, ABS Telecom and/or Windstream or this Business Agreement is void.

Hunt Regional Medical Center

Windstream Communications

Signature: _____

Signature: _____

Printed Name: _____

Printed Name: _____

Title: _____

Title: _____

Date: _____

Date: _____

ABS Telecom LLC

Signature: _____

Printed Name: _____

Title: _____

Date: _____

8/15/2017

ATTACHMENT E



Amy Speck <amy@abstelecom.net>

OK...we got approval on the letter you sent over for Hunt

1 message

Mungeer, Zachary William <Zachary.Mungeer@windstream.com>

Mon, Mar 30, 2015 at 10:03 AM

To: Gary Speck <gary@abstelecom.net>, Amy Speck <amy@abstelecom.net>

Cc: "Pearce, James Edward" <James.Pearce@windstream.com>

However legal requires it to be in Windstream legal addendum format so that it ties to the agreement formally. Let me know if there are any issues with this

Enclosed is a blank copy as well as a Windstream executed copy to get the ball rolling.

Zachary Mungeer

Senior Counsel - Health Care Law & Compliance

16479 Dallas Parkway | Addison, TX 75001

zachary.mungeer@windstream.com | www.windstreambusiness.com

o: 972-361-2318 | m: 646-621-3904 | f: 469-341-3204

windstream

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2 attachments

add_27481_Hunt Regional Medical Center - Rural Health Care Addendum - Zach Mungeer 03_30_15.pdf
65K

Hunt_USAC_Letter.pdf
52K



ADDENDUM TO SERVICE TERMS AND CONDITIONS

This Addendum is entered between Windstream and its affiliates ("Windstream") Hunt Memorial Hospital District ("Customer") Proposal Numbers 353366, 353368 and 353370 and amends the Windstream Service Terms and Conditions ("Agreements") entered between Windstream and Customer ("Parties").

Proposal: 353366
Opportunity ID: 427160

Hunt Memorial Hospital District is responsible to pay directly to Windstream the equivalent of the Urban Rate (\$665/month). ABS Telecom will submit to the Rural Healthcare program the documentation required to obtain the difference between the Urban Rate and the Rural Rate (\$46,338.60/month). Such amounts would be paid directly to the carrier from the RHC program. Hunt Memorial Hospital District must respond within a 2 day window to all RHC program related requests from the USAC, PQA, ABS Telecom and/or Windstream or this Business Agreement is void.

Proposal: 353368
Opportunity ID: 427174

Hunt Memorial Hospital District is responsible to pay directly to Windstream the equivalent of the Urban Rate (\$665/month). ABS Telecom will submit to the Rural Healthcare program the documentation required to obtain the difference between the Urban Rate and the Rural Rate (\$41,628.20/month). Such amounts would be paid directly to the carrier from the RHC program. Hunt Memorial Hospital District must respond within a 2 day window to all RHC program related requests from the USAC, PQA, ABS Telecom and/or Windstream or this Business Agreement is void.

Proposal: 353370
Opportunity ID: 427194

Hunt Memorial Hospital District is responsible to pay directly to Windstream the equivalent of the Urban Rate (\$665/month). ABS Telecom will submit to the Rural Healthcare program the documentation required to obtain the difference between the Urban Rate and the Rural Rate (\$40,055.40/month). Such amounts would be paid directly to the carrier from the RHC program. Hunt Memorial Hospital District must respond within a 2 day window to all RHC program related requests from the USAC, PQA, ABS Telecom and/or Windstream or this Business Agreement is void.

RATE INCREASES

Windstream and Customer agree that notwithstanding anything to the contrary in the Agreement, if during the Term of the Agreement Windstream increases Customer's monthly recurring charges for the Services being provided under the Agreement (or, in the case of long distance services, the per minute charge for the such services) by any amount above the amounts set forth in Customer's signed proposal executed contemporaneously with this Agreement, Customer shall have the right, upon thirty (30) days written notice, to terminate the Agreement without liability other than payment for Services rendered through the termination date. The foregoing right shall not apply to changes to, additions of and/or increases in applicable fees, taxes and other government-mandated charges.

GOOGLE

Windstream and Customer hereby agree that Agreement Section 11. **Google** shall be deleted in its entirety, as well as any references to Google throughout the Agreement.

LOSS OF RURAL HEALTHCARE FUNDING

Windstream and Customer hereby agree that Customer shall have the right to cancel or reduce any and all Services at any time without liability for Liquidated Damages due to reduction or loss of Rural Healthcare program funding from the Universal Service Administrative Company ("USAC") appointed by the Federal Communications Commission ("FCC"). Customer may cancel or reduce Services upon at least thirty (30) business days' written notice to Windstream in the event funds for Service become unavailable/reduced or in the event of exigent circumstance. Customer shall pay Windstream for all charges for Services incurred prior to any such cancellation or reduction.

INDEMNITY

Windstream and Customer hereby agree that the following shall be inserted at the beginning of Agreement Section 17. Indemnity:

To the extent allowed by the laws of the State of Texas, .. "

The Agreement noted above and this Addendum constitutes the Parties' entire agreement. To the extent there is a conflict between this Addendum and the Agreement, this Addendum controls.

This Addendum may be executed in several counterparts, and all counterparts so executed shall constitute one binding agreement on the Parties hereto and each executed counterpart shall be deemed an original. Facsimile signatures shall be accepted as valid and binding for all purposes.

Windstream and Customer each aver that the signatories to this Addendum below have authority to sign this Addendum.

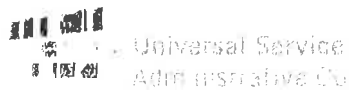
Hand-written modifications to this Addendum are not binding on either Windstream or Customer.

Hunt Memorial Hospital District

Windstream and its affiliates

By _____
Name:
Title:

By: _____
Name: *Deborah Mungar*
Title: *Channel Manager*
4/8/15



Rural Health Care Telecommunications Program -- Information Request

Date: 08-01-2017
Program: Telecommunications Program
Funding Year(s): 2015
Health Care Provider (HCP) Name(s): Hunt Regional Medical Center at Quinlan
HCP Number(s): 42055
Funding Request Number(s) (FRNs): 1585279, 1585298
FCC Form 465 Application Number(s): 43160643

The Rural Health Care (RHC) Telecommunications Program provides eligible health care providers (HCPs) with support for the difference between urban and rural rates for eligible telecommunications services, subject to limitations set forth in the Commission's rules. HCPs request funding through the RHC Telecommunications Program by submitting an FCC Form 466 on which they provide the monthly urban and rural rate for funding requests for base rate support (i.e., the difference between the urban and rural rates), or mileage charges for funding requests for mileage-based support for the requested service. HCPs that request base rate support are required to submit supporting documentation for the provided urban and rural rates.

FCC rules require HCPs to conduct a competitive bidding process for eligible services by submitting an FCC Form 465, considering all bids received, waiting 28 days before selecting or signing a contract for eligible services, and selecting the most cost-effective method of providing the supported service.¹

ACTION REQUIRED

To ensure that FCC rules requiring a fair and competitive bidding process have been met, USAC is performing due diligence on the competitive bidding process for FCC Form 465 Application Number 43160643.

Please submit a complete list of any and all channel alliance members, channel partners, and/or sales contractors paid or otherwise compensated by Windstream Communications, LLC in connection with the competitive bidding process for FCC Form 465 Application Number 43160643. The list should be provided on Windstream Communications, LLC's letterhead and include a statement, signed by an authorized officer, certifying on behalf of Windstream Communications, LLC that the information provided is true, accurate, and complete to the best of the officer's knowledge as of the date of his or her signature.

If Windstream Communications, LLC is unable to provide the certification above, please provide an explanation specifying the reason(s).

¹ See 47 C.F.R. §§ 54.603(a), (b)(4), 54.615(a) (2015).



Please submit your responses to these inquiries by no later than fourteen (14) calendar days from the date of this letter. Failure to provide the requested information within this time frame will result in denial of the funding request.

windstream

Rural Health Care Telecommunications Program Information Request

Action Required

Please submit a complete list of any and all channel alliance members, channel partners, and/or sales contractors paid or otherwise compensated by Windstream Communications, LLC in connection with the competitive bidding process for FCC Form 465 Application Number 43160643. The list should be provided on Windstream Communications, LLC's letterhead and include a statement, signed by an authorized officer, certifying on behalf of Windstream Communications, LLC that the information provided is true, accurate, and complete to the best of the officer's knowledge as of the date of his or her signature.

Windstream Response

In connection with the competitive bidding process initiated by Hunt Memorial Hospital ("Hunt") for FCC Form 465 Application Number 43160643 dated January 16, 2016, Windstream has determined that it worked with and compensated ABS Telecom, LLC ("ABS") (and its principal, Gary Speck) as a channel partner.

Around the time of Windstream's bid on the Hunt project in question, Windstream had recently discovered that ABS may have been acting as a consultant for another Windstream customer that was a rural healthcare ("RHIC") program participant, and Windstream accordingly commenced an internal investigation into whether ABS was serving a dual role as Windstream's channel partner while also serving as a consultant for that customer or other customers. When considering a bid on the Hunt project, however, Windstream's government support team concluded that no such conflict would exist for any agreement with Hunt, based on their understanding (from a review of previous Form 465 requests) that Hunt had engaged a different consultant, PEM Filings.

More specifically, Windstream's sales team received an informal request to submit a bid on the Hunt project in question by phone from Mr. Speck, and was not aware of the specific Form 465 for that project at the time it evaluated whether to bid. Based on the belief that Hunt was not represented by ABS in connection with the instant project, Windstream proceeded to submit a bid.

In March 2016, after the contract for services under Application Number 43160643 had been executed, Windstream discovered the relevant Form 465 on the USAC website and became aware that ABS was acting as Hunt's consultant on this particular request for services. After completing its internal review, Windstream determined that the best course of action was to terminate its relationship with ABS and Mr. Speck—and Windstream informed ABS of such termination on April 19, 2016. Windstream maintained the service agreement with Hunt (a) to avoid disruption of services and potential economic harm to the customer, and (b) based on Windstream's determination that its bid was not affected by any potential conflict arising from ABS's dual role. Additionally, Windstream's bid was entirely consistent with its routine pricing policies. In this case, the price was based on the cost of obtaining a third-party circuit for

resale (which was the most cost effective option for servicing the locations at issue) plus Windstream's standard resale markup. After entering into the agreement with Hunt (which has since been terminated) and becoming aware of the apparent conflict involving ABS, Windstream implemented a number of changes in its procedures relating to bidding on RHC and E-Rate projects. In particular, in addition to terminating its relationship with ABS, Windstream decided to end its reliance on any channel partners for any such bids.

Windstream Certification

I, Tim P. Loken, Director of Windstream Communications, LLC ("Windstream"), certify on behalf of Windstream that the information provided above is true, accurate and complete to the best of my knowledge as of the date of my signature below.

Signature

Date

9/15/2017

ATTACHMENT G

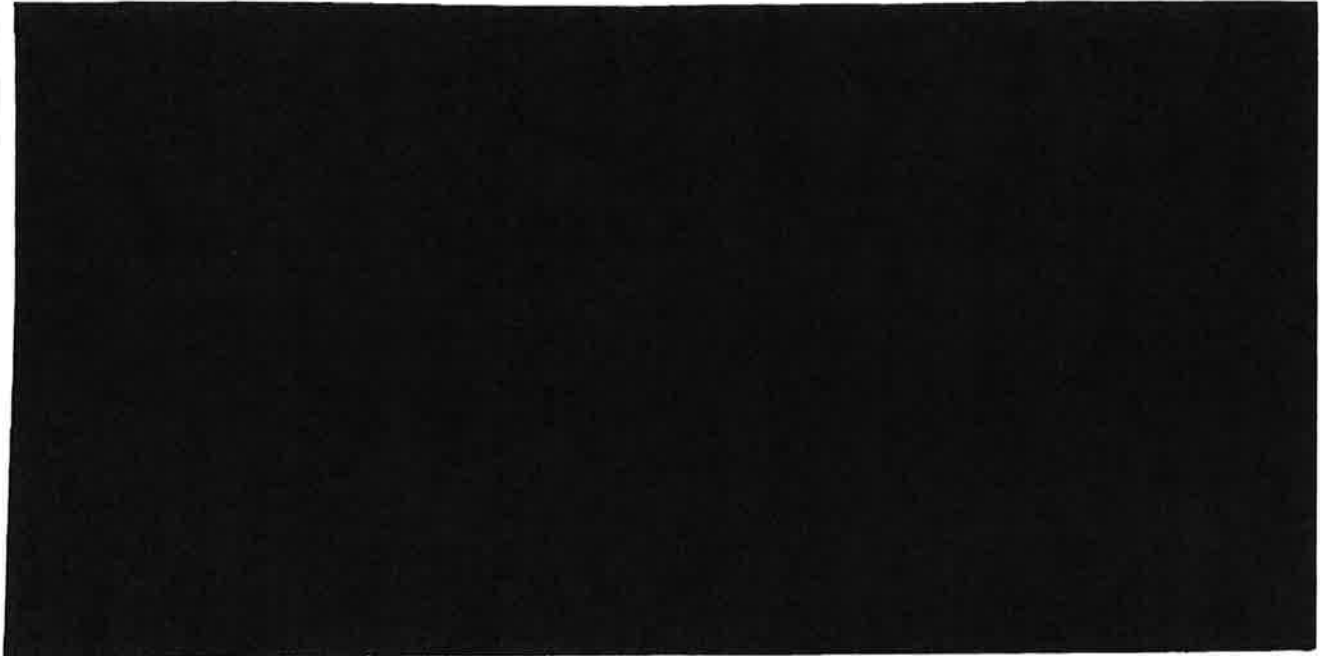


Amy Speck <aspeck47@gmail.com>

FW: Windstream/ABS Indemnification Agreement

Bloom, Jason <Jason.Bloom@haynesboone.com>
To: "Amy Speck (aspeck47@gmail.com)" <aspeck47@gmail.com>
Cc: "Beckert, Brent" <Brent.Beckert@haynesboone.com>

Wed, Sep 14, 2016 at 2:59 PM



From: Keith, Carol [mailto:Carol.Keith@windstream.com]
Sent: Wednesday, September 14, 2016 1:56 PM
To: Bloom, Jason
Cc: Jones, Kendra
Subject: RE: Windstream/ABS Indemnification Agreement

Assuming we can work through the other language, our biggest hurdle was lack of personal liability so should ABS put \$5M in a mutually-agreeable escrow fund, we can get past this hurdle. Basically, it's a limitation of liability but we know the funds are there if ABS dissolves, etc.

We are having several audits related to ABS customers and we question whether funding will ensue for those customer, which might also bring up issues with already-paid commissions.

From: Bloom, Jason [mailto:Jason.Bloom@haynesboone.com]
Sent: Wednesday, September 14, 2016 1:52 PM
To: Keith, Carol <Carol.Keith@windstream.com>

<https://mail.google.com/mail/u/1/?ui=2&ik=7d99743a90&jsver=ujO6RgBCJN0.en.&view=pt&msg=1572a485037f593f&q=jason%20bloom&q=true&sea...> 1/2

EXHIBIT 5

DEALER AGREEMENT

IT IS AGREED on the date of execution ("Effective Date") by Windstream Communications, Inc. and its affiliates ("Windstream"), a corporation with offices at 4001 Rodney Parham Rd., Little Rock, AR 72212 and
ASSOCIATES LLC hereinafter ("Dealer") whose address is
6505 PARK BLVD. #306, PMB 130, PLANO TX 75093

1. **Relationship** -

- A. Dealer represents and warrants to Windstream that Dealer has experience and expertise in the telecommunications and data industries.
- B. Dealer is an independent contractor and is not an employee of Windstream. No partnership, joint venture or other relationship is intended. Dealer exercises complete control of its entire method of business operations, subject only to the Dealer's obligations under this Agreement. Dealer has no authority to act for, or on behalf of Windstream and is not authorized to incur any obligation on behalf of Windstream or bind Windstream in any manner whatsoever.
- C. Dealer agrees to appoint a single point of contact for Windstream regarding all matters pertaining to this Agreement.
- D. Dealer shall identify itself at its office locations and in all dealings with prospective customers and the public as an independent business. Dealer is responsible for all expenses and obligations incurred by it as a result of its efforts to solicit customers.
- E. Windstream shall make no attempt to control the obtaining of any prospective customer applications and any marketing and promotion conducted by Dealer as permitted under this Agreement are the sole responsibilities of the Dealer, subject only to the terms of this Agreement.

2. **Services** - Windstream appoints Dealer as a **non-exclusive representative** within its service territory ("Territory") to promote the sale of and solicit orders from new business customers for local and long distance telecommunications, internet, web and email hosting, web and audio conferencing, and/or online data backup, and any other services designated by Windstream for Dealer to sell from time to time (the "Services"). For purposes of this Agreement, except for upsells and renewals to existing customers on which Dealer currently receives a commission, "new business customers" do not include customers that are current customers of either Windstream Communications, Inc. and/or the entities formerly known as NuVox Communications, Inc. and its affiliates, unless Dealer receives approval from a Senior Vice President at Windstream for any such sale.

Dealer acknowledges that not all Services are available in the entirety of the Territory. At Windstream's option and without the necessity of an amendment to this Agreement, the Territory and Services available may be expanded or contracted and pricing may be changed at Windstream's sole option. **Dealer agrees and acknowledges that Windstream markets and sells its Services through direct sales, indirect sales (including other dealers), and other sales channels in the Territory.**

3. **Agreement subject to Tariffs and Informational Materials** - This Agreement and all Services are governed by the terms and conditions contained in Windstream's tariffs and price lists (collectively, the "Tariffs") filed with federal and state regulatory agencies. Rates and terms are subject to change by Windstream or the appropriate regulatory agency at any time and from time to time. Dealer shall represent and sell the Services to potential customers only as the Services are described in the applicable Tariffs and Informational Materials. Tariffs and Informational Materials relating to the Services may be changed by Windstream at its sole discretion. Dealer shall not package any other business activity in such a manner to cause customers to pay charges in excess of Tariff or price list rates to obtain the Services.

4. **Order Processing** - Dealer agrees to exercise reasonable care in selecting customer accounts to submit to Windstream. Dealer shall not submit to Windstream any application which the Dealer knows or reasonably should know contains any material misstatement of fact or misleading information or omits to state any material fact. Dealer shall promptly provide Windstream with all information in its possession or that it is capable of obtaining concerning a customer or prospective customer which Windstream may reasonably request from time to time. Windstream shall have the right, at its sole discretion, to accept or reject all orders and to determine the terms and conditions of the Services or other adjustments without liability to Dealer.

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5. Product Literature and Marketing Materials - Windstream shall make available to Dealer literature and materials relating to Windstream and the Services. Dealer shall not develop or use any product literature other than that provided by Windstream without the written consent of Windstream.
6. Trademarks and Trade Names - Dealer agrees to comply with any standards of usage for Windstream trademarks and trade names issued or to be issued by Windstream from time to time. Dealer shall not use the name "Windstream" or any name of a Service provided by Windstream or the Windstream symbol, and it shall not use any trademark, service mark or logo of Windstream or symbol related to Windstream (collectively, the "Intellectual Property") without the prior, express written consent of Windstream. Dealer may, with Windstream's prior written consent and approval, advertise or provide information about the Services or use the Intellectual Property on the Internet or print or electronic media. Dealer shall not acquire any right, title or interest in the Intellectual Property or any goodwill associated with the Intellectual Property and Windstream's business shall inure exclusively to Windstream. Dealer shall not directly or indirectly contest or aid in contesting the validity or ownership of any of the Intellectual Property. Breach of this provision shall result in immediate termination of the Agreement without further liability whatsoever to Dealer by Windstream but Windstream may pursue any remedies available to it in law or equity.
7. Duties of Dealer -
 - A. Dealer shall use best efforts to market the Services and secure customers for Windstream. Windstream shall have no responsibility for customer development or marketing. Dealer shall follow Windstream's Policies and Procedures, as they may be modified from time to time by Windstream in its sole discretion. Dealer acknowledges that the Policies and Procedures include, but are not limited to, matters relating to (i) the proper representation of the Services which Windstream will provide customers and (ii) the manner in which to complete applications, network and credit information and other documentation with respect to prospective customers of Windstream.
 - B. Dealer shall provide reasonable assistance to Windstream, at Windstream's request, in connection with Windstream's servicing of all accounts which Dealer has established or establishes. Dealer shall not provide customer service to any customer solicited by Dealer, including billing collections or repair service; however, Dealer agrees to assist with collections from time to time, if requested by Windstream.
 - C. Dealer shall comply with all laws, rules and regulations applicable to Dealer's or Windstream's business and Dealer's performance of its services hereunder. Dealer shall promptly provide Windstream with all information which Windstream may request from time to time in connection with Dealer's obligations under this Agreement. Dealer shall not make any representations or warranties regarding the Services provided by Windstream.
 - D. Dealer shall not submit a prospective customer to Windstream who or which is already a customer of Windstream by reason of the efforts of another agent or employee of Windstream. Dealer agrees and acknowledges that during the term of the Agreement and for a period of one year following the termination of this Agreement, Dealer and/or its agent will not, whether directly or indirectly, solicit, or attempt to solicit, the business of any customer of Windstream with which Dealer had contact, or any customer or prospective customer of Windstream which was provided to Dealer by Windstream (whether on a lead list or otherwise) for the purposes of selling products or services of another provider that are substantially similar to the Services.
8. Commission -
 - A. During the term of this Agreement and any extensions thereof and provided Dealer is not in default of any obligation hereunder, Dealer may receive a commission as described in Exhibit A on Monthly Billed Revenue for new accounts solicited by Dealer, excluding existing Windstream account conversions, on the Services sold by Dealer in accordance with the Tariffs and/or price lists. "Monthly Billed Revenue" is defined as charges for Services invoiced to a customer by Windstream during a one month period relating to Services sold by Dealer in accordance with this Agreement (excluding taxes, termination charges and other fixed monthly service fees and rate increases applied to customer by Windstream). All federal, state, local and other taxes that may be due as a result of commission and any other payment by Windstream to Dealer will be the sole responsibility of Dealer. Windstream agrees to distribute any commission on Monthly Billed Revenue approximately sixty (60) days from the end of the month in which such Monthly Billed Revenue is received and accounted for by Windstream. Dealer shall have 150 days from the installation date of Windstream services to dispute the determination of commission payable, if any, with respect to a customer. After the expiration of the 150-day period, Dealer shall be prohibited from disputing commissions relating to such customer.

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- B. Dealer agrees that Windstream may, in Windstream's sole discretion, at any time and from time to time increase or decrease the commission percentages listed in Exhibit A. Any such increase or decrease shall take effect thirty (30) days after Windstream gives Dealer notice thereof and such change shall be effective for Monthly Billed Revenue from all persons and or entities that execute a new agreement for Services or renew an agreement for Services after the effective date of the increase or decrease in commission percentage(s).
- C. In the event of termination of this Agreement by Windstream during the initial or a renewal term pursuant to section 9A of this Agreement, Windstream agrees to pay Dealer full commission as indicated in the table included in Exhibit A on Monthly Billed Revenue generated by Dealer from the sale of Windstream Services for the initial six (6) months following termination and one half of the commission indicated in the table included in Exhibit A on Monthly Billed Revenue generated by Dealer from the sale of Windstream Services for the second six (6) months following termination and nothing after the first anniversary of such termination. Any such commission shall be subject in all cases to the right of Windstream to decrease commissions pursuant to Section 8B this Agreement, the terms of which shall survive the termination of this Agreement with respect to commissions to be paid following such termination. No commission shall be payable following termination by Dealer pursuant to Section 9A of this Agreement, on thirty (30) days notice prior to the end of the initial or a renewal term by either party pursuant to Section 9A of this Agreement, or any termination by Windstream pursuant to Section 9B of this Agreement. Windstream shall have no other obligations hereunder or otherwise with respect to Dealer from and after the termination or expiration date, and Windstream shall continue to have all other rights available hereunder.
- D. Dealer agrees and acknowledges that Windstream may, in its sole discretion compare revenue for Services actually collected by Windstream to Monthly Billed Revenue and charge back to Dealer the difference in commissions associated with such uncollected Monthly Billed Revenue. Windstream also reserves the right to set off from commissions any amount due to Windstream by Dealer. Additionally, at its option Windstream may from time to time deduct from the compensation otherwise due to Dealer the appropriate commission percentage of customer billings for any month, which have not been paid in a timely manner. If and when such billings are paid, Windstream shall promptly remit the withheld or deducted appropriate percentage of the paid billings to Dealer.
- E. Dealer agrees and acknowledges that Windstream may audit Dealer's records in conjunction with an investigation related to Dealer's sale of Services and/or a determination of any errors in commissions paid to Dealer. Windstream may exercise this audit right once per year during the term of this Agreement.
- F. Dealer agrees and acknowledges that sales of Services made prior to the execution of this Agreement by both parties and prior to the assignment of an authorized Dealer ID code, will not be applied to Monthly Billed Revenue for commissions until after the Agreement is executed.
- G. Dealer may, but shall not be required to, become a customer of Windstream with respect to its needs for Services. In such event, during the term of this Agreement and thereafter (regardless of the reason, if any, for termination of this Agreement), Dealer shall pay all Windstream invoices for Services in accordance with their respective terms and subject to the terms of the Customer Service Agreement between Dealer and Windstream. In its sole discretion, Windstream may at any time suspend the payment of all commissions due to Dealer until Dealer has paid in full any past due invoice(s) for Services.
- H. Dealer or any party acting for or on behalf of Dealer may not allege that Dealer has a claim to any commission, compensation, profits, or damages whatsoever with respect to any Services: (i) when Windstream has rejected the Customer for any reason, (ii) that may be cancelled by a customer, whether or not due to a default by Windstream, (iii) for which the account becomes uncollectible, or (iv) when the Services are provided in full satisfaction of any warranty or other contract breach, tort or other claim.
9. Terms and Termination
- A. The initial term of this Agreement shall be for twelve (12) months from the Effective Date and shall be renewed thereafter automatically on a year-to-year basis, unless sooner terminated as hereinafter provided, subject to and upon the terms and conditions herein specified. Either party may terminate this Agreement anytime during the initial term or any renewal term upon giving the other party thirty (30) days prior written notice.
- B. Windstream may terminate this Agreement upon written notice to Dealer upon the occurrence of any of the following events:
1. Failure of Dealer to meet an amount equal to or exceeding the following:

GATS

- \$5,000.00 per month after twelve months
 - \$10,000.00 per month after twenty-four months
 - \$20,000.00 per month after thirty-six months
2. Failure of Dealer to obtain \$2,000 in new sales in any given calendar year quarter.
 3. Dealer solicits any Windstream customer on behalf of a competitor of Windstream, or Dealer solicits any Windstream customer not originally sold by Dealer for the purpose of converting any Windstream Service to another or for selling or upgrading Windstream Service.
 4. Dealer accepts employment with Windstream.
 5. Breach of any provision of this Agreement by Dealer, or if Dealer defaults, fails to perform its obligation hereunder, or participates or engages in any activity relating to fraud, Dealer falsifies or forges any order for Services, or engages in activity that disparages or otherwise harms the business reputation of Windstream.
 6. Insolvency, bankruptcy, receivership, dissolution or change of control of Dealer or Dealer's assignment of this Agreement without Windstream's written consent, which shall not be unreasonably withheld.
 7. Dealer's creditworthiness and/or financial condition are not satisfactory in Windstream's reasonable discretion (Dealer hereby authorizes Windstream to obtain reports of Dealer's credit worthiness and/or financial condition from third parties).
 8. Dealer receives, or attempts to receive, whether directly or indirectly, sales leads or related information from any person or entity associated with Windstream in a manner that is inconsistent with the terms of this Agreement regarding the distribution of such leads or information.
10. Confidential Information - During the term of this Agreement, Dealer may from time to time have access to confidential information and trade secrets of Windstream, which may include, customer names, potential customer lists, cost data and information about the Services (all such confidential information or trade secrets being referred to as the "Confidential Information"). Dealer acknowledges that any disclosure of Confidential Information would have an adverse effect on Windstream and agrees that during the term of this Agreement, and for a period of twenty-four (24) months following the termination of this Agreement, Dealer will hold in confidence the Confidential Information and will not disclose it to any person except with the specific prior written consent of Windstream. Dealer agrees that upon the termination of this Agreement, Dealer will promptly return all Confidential Information to Windstream and not retain any copies, abstracts or other physical or electronic embodiment of the Confidential Information.
11. Customer Proprietary Network Information ("CPNI") - Dealer may have access to and use CPNI, as that term is defined in Section 222 of the Telecommunications Act and FCC regulations, only as specifically permitted by Windstream in this Agreement. Dealer is prohibited from accessing or using CPNI (including, but not limited to, any CPNI in commission reports) for marketing purposes unless it has obtained Customer's consent via the opt-in consent form provided by Windstream. Dealer must provide all Customer opt-in consent forms to Windstream. Dealer is prohibited from disclosing CPNI to any person or entity unless required to disclose under force of law. Dealer shall take all necessary measures to ensure the ongoing confidentiality of such CPNI. Dealer agrees that, upon termination of the Agreement, Dealer will promptly return all CPNI to Windstream and will not retain any form of the CPNI. Dealer shall maintain a record of each use of CPNI for marketing purposes. Dealer shall notify Windstream immediately upon discovery of a breach, or upon discovery of a suspected breach, of CPNI.
12. Identity Theft Detection, Prevention, Mitigation. In its interaction with customers, Dealer may obtain access to personal identifying information of customers with "covered accounts" as defined by the "Red Flags Rules" promulgated by the Federal Trade Commission, as part of the Fair and Accurate Credit Transactions Act of 2003. Covered accounts are accounts used mostly for personal, family, or household purposes that involve multiple payments or transactions or an account for which there is a foreseeable risk of identity theft, such as small business or sole proprietorship accounts. Pursuant to Windstream's voluntary Red Flags Rule Compliance Plan, Dealer shall comply with the Red Flags Rules and have in place reasonable policies and procedures designed to detect relevant red flags of possible identity theft and to either report any identified red flags to Windstream or take appropriate steps to prevent or mitigate identity theft.
13. Representations, Warrants, and Covenants - Dealer represents, warrants and covenants to Windstream that at the Effective Date and continuing for the term of this Agreement that:

REDACTED

windstream
connecting business to business

- A. Dealer is duly organized and in good standing and qualified to do business under the laws of TEXAS with a Federal EIN or SSN of _____ and has full and unrestricted power and authority to execute and perform under this Agreement.
- B. Dealer has obtained all licenses, permits and other authorizations necessary to perform its obligations under this Agreement and shall maintain same, as required, in full force and effect during the term of this Agreement and shall comply with all Windstream Tariffs and price lists and regulations and orders of judicial and regulatory bodies and all local, state, and federal laws applicable to Dealer or to Windstream.
- C. Dealer shall obtain a signed authorization for Services in a format approved by Windstream in writing, for each customer sold hereunder ("Authorization"), and Dealer shall use commercially reasonable efforts to safeguard against the submission of improper, inaccurate and invalid Authorizations. In the event a local telephone company ("LEC"), any regulatory entity, or a court of law assesses Windstream any charges for improper, inadequate or invalid Authorizations relating to Windstream Services ordered through Dealer, Dealer shall promptly reimburse Windstream for all such charges, plus a Windstream management fee of one thousand dollars (\$1,000.00) per customer telephone number ordered through Dealer that is deemed to lack proper Authorization. Payment for said charges may be withheld from commissions, provided however, no charge or fee shall be payable by Dealer if the charge or fee is the result from improper format of the Authorization as approved by Windstream hereunder. Upon request of Windstream, Dealer will provide to Windstream or the LEC, at Dealer's expense, any documentation required by the LEC regarding the Authorization for customers sold hereunder. In addition, Dealer shall promptly and in good faith cooperate with Windstream and all LECs in attempting to resolve all carrier selection and Authorization disputes.
- D. That neither the execution and delivery of this Agreement nor the sales of Windstream Services in accordance with the terms of this Agreement violates or will violate i) the provisions or obligations of any other agreement to which Dealer is a party or by which it is bound, or ii) Dealer's articles of incorporation, by-laws or similar corporate governance documents
- E. Dealer shall provide, a copy of "WINDSTREAM POLICIES AND PROCEDURES REGARDING SLAMMING PREVENTION" including an "Acknowledgement" form as set forth in Exhibit C, to all employees, agents, contractors, or independent distributors involved in the selling of Windstream Services. Dealer shall have the employee, agent, contractor, or independent distributor review the aforementioned policy and return to the Dealer a signed "Acknowledgement" form indicating they understand and will comply with the Windstream policy. Dealer further agrees to produce a copy of the signed "Acknowledgement" form within forty-eight (48) hours, upon Windstream's request for any employee, agent, contractor, or independent distributor. If Dealer does not comply with the request for providing a signed "Acknowledgement" form, then Windstream may suspend accepting LOAs hereunder and/or service order information or terminate this Agreement immediately.
14. Indemnification - Dealer shall indemnify, defend and hold Windstream (and all officers, directors, employees, agents and affiliates thereof) harmless from and against any and all claims, demands, judgments, actions, losses, damages, assessments, charges, liabilities, costs and expenses (including without limitation, interest, penalties, attorney's fees and disbursements) which may at any time be suffered or incurred by, or be asserted against, any and all of them, directly or indirectly, on account of or in connection with Dealer's breach or default under any provision(s) herein; or bodily injury, damage to property (including death), economic or other damages to any person or entity (including without limitation, any employee of Dealer and/or any third person), and any damage to or loss of use of any property, pursuant, directly or indirectly, to acts or omissions of the Dealer's employees, contractors and agents.
15. NO IMPLIED OR STATUTORY WARRANTIES, DISCLAIMERS - NO WARRANTIES ARE MADE BY WINDSTREAM WITH RESPECT TO THE SERVICES, ANY LABOR, PRODUCTS, SOFTWARE, OR EQUIPMENT, WELCOME KITS, GUIDES, OR ANY OTHER SERVICES OR MATERIALS PROVIDED BY WINDSTREAM TO DEALER AS PART OF OR UNDER THIS AGREEMENT (COLLECTIVELY "WINDSTREAM MATERIALS"). TO THE MAXIMUM EXTENT PERMITTED BY APPLICABLE LAW, WINDSTREAM PROVIDES THE WINDSTREAM MATERIALS "AS IS" AND "AS AVAILABLE", AND, WITH RESPECT TO THE WINDSTREAM MATERIALS, HEREBY DISCLAIMS ALL WARRANTIES, CONDITIONS, OR DUTIES OF ANY NATURE WHATSOEVER (EXCEPT DUTIES OF GOOD FAITH), INCLUDING, BUT NOT LIMITED TO, ANY IMPLIED WARRANTIES OF MERCHANTABILITY OR FITNESS FOR A PARTICULAR PURPOSE, ANY STATUTORY OR EXPRESS WARRANTIES, AND ANY WARRANTIES OR DUTIES REGARDING ACCURACY, COMPLETENESS, TIMELINESS, PERFORMANCE, WORKMANLIKE EFFORT, LACK OF NEGLIGENCE OR INTERRUPTED SERVICE. FURTHER, THERE IS NO WARRANTY OF TITLE OR THAT THE PROVISION OR OPERATION OF ANY WINDSTREAM MATERIALS WILL BE TIMELY OR UNINTERRUPTED.

CHS

16. EXCLUSION OF INCIDENTAL, CONSEQUENTIAL AND OTHER DAMAGES - TO THE MAXIMUM EXTENT PERMITTED BY APPLICABLE LAW, IN NO EVENT SHALL WINDSTREAM BE LIABLE FOR ANY SPECIAL, INDIRECT, INCIDENTAL OR CONSEQUENTIAL DAMAGES WHATSOEVER (INCLUDING BUT NOT LIMITED TO DAMAGES FOR LOSS OF PROFITS OR CONFIDENTIAL OR OTHER INFORMATION, FOR BUSINESS INTERRUPTION, FOR PERSONAL INJURY, FOR LOSS OF PRIVACY, FOR FAILURE TO MEET ANY DUTY, INCLUDING OF GOOD FAITH OR OF REASONABLE CARE, FOR NEGLIGENCE, AND FOR ANY OTHER PECUNIARY OR OTHER LOSS WHATSOEVER), ARISING OUT OF OR IN ANY WAY RELATED TO THE WINDSTREAM MATERIALS, EVEN IF WINDSTREAM HAS BEEN ADVISED OF THE POSSIBILITY OF SUCH DAMAGES.
17. LIMITATION OF LIABILITY AND EXCLUSIVE REMEDY - SUBJECT TO APPLICABLE LAW AND NOTWITHSTANDING ANY DAMAGES THAT DEALER MAY INCUR FOR ANY REASON WHATSOEVER, (INCLUDING WITHOUT LIMITATION, ALL DAMAGES REFERENCED IN SECTION 15 ABOVE AND ALL DIRECT OR GENERAL DAMAGES), THE ENTIRE LIABILITY OF WINDSTREAM UNDER ANY PROVISION OF THIS AGREEMENT OR WITH RESPECT TO THE WINDSTREAM MATERIALS, AND DEALER'S EXCLUSIVE REMEDY AGAINST WINDSTREAM (EXCEPT FOR ANY REMEDY OF REPAIR OR REPLACEMENT ELECTED BY WINDSTREAM) SHALL BE LIMITED TO THE AMOUNT ACTUALLY PAID FOR THAT PORTION OF THE WINDSTREAM MATERIALS THAT CAUSES THE DAMAGE(S). THE FOREGOING LIMITATIONS, EXCLUSIONS, AND DISCLAIMERS (INCLUDING SECTIONS 14 AND 16 ABOVE) SHALL APPLY TO THE MAXIMUM EXTENT PERMITTED BY APPLICABLE LAW, EVEN IF ANY REMEDY FAILS OF ITS ESSENTIAL PURPOSE. THE LIMITATION OF LIABILITY SET FORTH HEREIN IS FOR ANY AND ALL MATTERS FOR WHICH WINDSTREAM MAY OTHERWISE HAVE LIABILITY ARISING OUT OF OR IN CONNECTION WITH THIS AGREEMENT, WHETHER THE CLAIM ARISES IN CONTRACT, TORT, STATUTE OR OTHERWISE.

THE PROVISIONS OF THIS AGREEMENT TOTALLY ALLOCATE THE RISKS BETWEEN WINDSTREAM AND DEALER. WINDSTREAM COMMISSION RATES REFLECT THIS ALLOCATION OF RISK AND THE LIMITATION OF LIABILITY SPECIFIED HEREIN. WINDSTREAM AND DEALER AGREE THAT THE LIMITATIONS OF THESE SECTIONS 14, 15 AND 16 ARE A BARGAINED FOR EXCHANGE IN CONSIDERATION OF THE COMMISSION RATES AFFORDED TO DEALER.

18. Miscellaneous.

- A. Assignment and Delegation. No party hereto may assign or delegate any of its rights or obligations hereunder without the prior written consent of the other party hereto, which shall not be unreasonably withheld, provided, however, that Windstream shall have the right to assign without notice all or any part of its rights and obligations under this Agreement to (i) any affiliate or successor of Windstream or (ii) the purchaser of all or substantially all of the assets of the Windstream. Except as otherwise expressly provided herein, all covenants and agreements contained in this Agreement by or on behalf of any of the parties hereto shall bind and inure to the benefit of the respective successors and assigns of the parties hereto whether so expressed or not.

Dealer may not delegate any of its responsibilities hereunder to any person other than one or more individuals each of who are employees of Dealer. Dealer shall not encourage or permit any employee or agent of it to perform or omit to perform any act which performance or omission, if committed by Dealer, would be a violation of this Agreement. Dealer agrees not to establish "sub agents" of any kind (interconnects, consultants, etc.) with respect to Dealer's services hereunder without the prior written consent of Windstream. Dealer may not assign any of its rights or obligations under this Agreement, and any such assignment shall be null and void.

- B. Severability. Whenever possible, each provision of this Agreement shall be interpreted in such manner as to be effective and valid under applicable law, but if any provision of this Agreement is held to be prohibited by or invalid under applicable law, such provision shall be ineffective only to the extent of such prohibition or invalidity, without invalidating the remainder of this Agreement.
- C. Waiver. Either party's failure to enforce any provision or provisions of this Agreement shall not in any way be construed as a waiver of any such provision or provisions as to any future violations thereof, nor prevent that party thereafter from enforcing each and every other provision of this Agreement. The rights granted the parties herein are cumulative and the waiver by a party of any single remedy shall not constitute a waiver of such party's right to assert all other legal remedies available to him or it under the circumstances.
- D. Notices. All notices, demands or other communications to be given or delivered under or by reason of the provisions of this Agreement shall be in writing and shall be deemed to have been duly given if (i) delivered personally to the recipient, (ii) sent to the recipient by reputable express courier service (charges prepaid) or mailed to the recipient by certified or registered mail and postage prepaid, or (iii) transmitted by telecopy to the recipient with a confirmation copy to follow the next day to be delivered by overnight carrier. Such notices, demands and other communications shall be sent to the addresses indicated below:



If to Dealer: (Please print) **ABS Telecom**
Internet, Voice, and Data Solutions
Company Name: ☒
Company Contact: ☐
Address: ☐
Business Phone: ☐
Business Fax: ☐
E-mail: ☐
Gary H. Speck
President
Senior Design Engineer

6505 W. Park Blvd.
Suite 306, #130
Plano, Texas 75093

(972) 407-0063 Office
(214) 534-8630 Cell
(214) 291-5901 Fax
gary@abstelecom.net

If to Windstream: **Windstream Communications, Inc.**
ATTN: Legal Department
4001 Rodney Parham Rd.
Little Rock, AR 72212

With Copy to: **Windstream Communications, Inc.**
ATTN: Vice President - Dealer Sales
2 North Main Street
Greenville, SC 29601

or to such other address or to the attention of such other Person as the recipient party has specified by prior written notice to the sending party.

- E. Entire Agreement. Except as otherwise expressly set forth herein, this Agreement sets forth the entire understanding of the parties, and supersedes and preempts all prior oral or written understandings and agreements with respect to the subject matter hereof. No modification, termination or attempted waiver of this Agreement shall be valid unless in writing and signed by the party against whom the same is sought to be entered.
- F. Governing Law. This Agreement shall be construed and enforced in accordance with, and all questions concerning the construction, validity, interpretation and performance of the Agreement shall be governed by, the laws of the State of Arkansas, without giving effect to provisions thereof regarding conflict of laws.
- G. Changes in the Law. Should any of the provisions of this Agreement need to be changed due to legal or regulatory requirements, Windstream shall notify Dealer of the need for such change and the parties shall execute an amendment to this Agreement or a new Agreement with the change contemplated. If the parties cannot come to an agreement on an amendment or a new Agreement, Windstream may terminate this Agreement without any further liability to Dealer for commissions or otherwise.

IN WITNESS WHEREOF, the parties have executed this Agreement as of the date signed by Windstream below.

Windstream

Dealer

By: _____

By: 

Printed Name: _____

Printed Name: Gary Speck

Title: _____

Title: MANAGING PARTNER

Date: _____

Date: 03/03/2011



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ADDENDUM TO DEALER AGREEMENT

This Addendum is entered between Windstream and ABS Telecom LLC _____
and modifies the Dealer Agreement entered between Windstream and Dealer ("Parties").

The Dealer Agreement shall be deemed amended as follows:

1. Paragraph 8(C) shall be replaced with:

In the event of termination of this Agreement by Windstream pursuant to section 9A of this Agreement, Windstream agrees to pay Dealer full commission as indicated in the table included in Exhibit A on Monthly Billed Revenue generated by Dealer from the sale of Windstream Services for the initial term and any subsequent renewals of the underlying Customer(s)' contracts. Any such commission shall be subject in all cases to the right of Windstream to decrease commissions pursuant to Section 8B this Agreement, the terms of which shall survive the termination of this Agreement with respect to commissions to be paid following such termination. No commission shall be payable following termination by Dealer pursuant to Section 9A of this Agreement, the non-renewal by either party pursuant to Section 9A of this Agreement, or any termination pursuant to Section(s) 6, 7 and/or 9B of this Agreement. Windstream shall have no other obligations hereunder or otherwise with respect to Dealer from and after the termination or expiration date, and Windstream shall continue to have all other rights available hereunder.

The Dealer Agreement and this Addendum constitute the Parties' entire agreement. To the extent there is a conflict between this Addendum and the Dealer Agreement, this Addendum controls.

This Addendum may be executed in several counterparts, and all counterparts so executed shall constitute one binding agreement on the Parties hereto and each executed counterpart shall be deemed an original. Facsimile signatures shall be accepted as valid and binding for all purposes.

Windstream and Dealer each aver that the signatories to this Addendum below have authority to sign this Addendum.

Hand-written modifications to this Addendum are not binding on either Windstream or Dealer.

Windstream

Dealer

By: _____

By: _____

Printed Name: _____

Printed Name: _Gary H. Speck_

Title: _____

Title: Managing Partner____

Date: _____

Date: 3/8/2011

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EXHIBIT A

Subject to the terms and conditions of the Agreement, Dealer may qualify for a commission pursuant to this Exhibit, as described herein. The commission plan becomes effective on the first day of the month following Windstream's execution of the Plan.

Standard Dealer Commissions

Qualifying Dealers will receive an initial commission rate of ten percent (10%) on Monthly Billed Revenue. Such commission rate may increase as outlined in the table below incremental back to dollar one of revenue above *Base Revenue* as dealer's billed revenue increases.

<u>Monthly Billed Revenue</u>	<u>Percentage</u>
\$0-\$4,999	10%
\$5,000-\$14,999	11%
\$15,000-\$29,999	12%
\$30,000-\$49,999	13%
\$50,000-\$74,999	14%
\$75,000-\$99,999	15%
\$100,000	16%

Windstream

Dealer

By: _____

By: [Signature]

Printed Name: _____

Printed Name: GARY H. SPACK

Title: _____

Title: Manager Partner

Date: _____

Date: 03/08/2011

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EXHIBIT B (Amendment to Dealer Agreement)

Fast Forward Commission Plan

Pursuant to the Fast Forward Commission Plan, Dealer may elect to commit to a Three-Month Incremental Sales Target (as indicated in the table below) and have the opportunity to achieve higher commission rates than those afforded pursuant to the Standard Commission Plan described in Exhibit A. Dealer's election to participate in the Fast Forward Commission Plan becomes effective on the first day of the month following Windstream's execution of the Fast Forward Commission Plan (the "Effective Date"). If Dealer commits and continues to achieve a Three-Month Incremental Sales Target, Dealer will qualify for commission rates consistent with the level of Dealer's Incremental Sales Target below. Dealer agrees and acknowledges that if Dealer fails to achieve its Three-Month Incremental Sales Target for four consecutive three-month periods (Annual Target), Windstream will decrease commission rates to an appropriate level consistent with the Standard Commission Plan

For Example, a Dealer elects to commit to the Fast Forward Commission Plan and a Three-Month Incremental Sales Target of \$3,500.00 to qualify for the thirteen percent (13%) commission rate under the Fast Forward Commission Plan rather than the ten percent (10%) under the Standard Commission Plan. Dealer would receive thirteen percent (13%) commission rate on all new accounts sold during the initial 3-month sales period following the Effective Date. Dealer would continue to receive the thirteen percent (13%) residual commission rate for as long as Dealer stays above the \$3,500.00 Three-Month Incremental Sales Target during each subsequent 3-month period. Dealer may fall back to the Standard Commission Plan if Dealer fails to meet the Three-Month Incremental Sales Target for four consecutive 3-month periods.

Fast Forward Three-Month Incremental Measurements

New Sales in a Quarter	Commission Rate	Dealer Initials	Windstream Initials
\$2,500.00	11%	_____	_____
\$3,000.00	12%	_____	_____
\$3,500.00	13%	_____	_____
\$4,000.00	14%	_____	_____
\$4,500.00	15%	_____	_____
\$6,000.00	16%	_____	_____

Windstream

Dealer

By: _____

By: [Signature]

Printed Name: _____

Printed Name: Gary H. Speck

Title: _____

Title: Managing Partner

Date: _____

Date: 03/08/2011

GS

EXHIBIT C

WINDSTREAM POLICIES AND PROCEDURES REGARDING SLAMMING PREVENTION

TO ALL DEALERS, REPRESENTATIVES OR AGENTS SELLING WINDSTREAM SERVICES:

All Dealers and their agents selling Windstream local, long distance and/or internet telecommunications services, digital subscriber line, web hosting and web design services and security services (the "Services") must carefully read the contents of this document which explains Windstream's policies and procedures for the sale of Windstream Services. The purpose of this document is to explain what can cause unauthorized switching of customer, the importance of preventing such switching, and the seriousness of the matter to Windstream. This document includes an "Acknowledgement" that must be read, signed, and returned to the Dealer and each individual selling Windstream services. Dealers must make a signed copy of this document available to Windstream, upon request.

A. COMMON CAUSES OF SLAMMING:

- Incorrect telephone number or submitted LOAs – means that incorrect telephone number is switched without the customer's written consent.
- The submitted LOA is illegible and directly causes the person that keys the order into the system to enter the wrong name and/or phone number.
- The person who "authorized" switching telecommunications services providers really didn't have the authority to make the switch. Sometimes receptionists, secretaries or assistants authorize a switch to qualify for some sort of premium or other inducement.
- A simple misunderstanding when one partner doesn't tell the other partner or accounts payable personnel about selecting a new long distance service. This is especially true when it is the other person who reviews or pays the bills. The bill-paying partner or accounts payable representative sees a new telecommunications services provider name things something is wrong. Please ask your customers to inform the appropriate persons within the company about changing telecommunications services providers.
- Signing someone up just to "get the sale" or reach a qualification or commission level.
- Signing someone up, without the customer's knowledge, as a result of spending a lot of time with a company decision-maker and assuming that the person would be satisfied with Windstream Services for the company.

B. EFFECTS OF SLAMMING:

- It is illegal and will not be tolerated by Windstream.
- It creates a bad image and adversely affects Windstream's and the Dealer's reputations.
- It takes time to investigate and correct
- If we can get information verified (correct), it will save on:
 1. Order rejects
 2. Returned mail
 3. Time to process valid and accurate orders.
- It is a frustrating experience for the company that was slammed.
- The local telephone company levies a charge to make the initial switch to Windstream and then charges again to switch the affected customer back to the original telecommunications company. Windstream and then the Dealer are billed for these costs. **This leads to serious consequences for the Dealer, including termination of the Agreement with Windstream, loss of commissions and liability to Windstream for the costs of investigating, defending and paying any and all fines associated with the charge of slamming.**

WINDSTREAM AS WELL AS FEDERAL, STATE, AND LOCAL REGULATORY AGENCIES VIEW "SLAMMING" AS A VERY SERIOUS PROBLEM. THE FCC CAN IMPOSE SIGNIFICANT FINES ON A PER VIOLATION BASIS.

C. HOW CAN A DEALER PROTECT AGAINST SLAMMING:

- You are strongly encouraged to verify information against each new customer's actual telephone bill for each LOA.
- The person signing the LOA should be a person with authority to act on behalf of the company. It is essential that the person signing the LOA has authority to change telecommunications services providers. *Note that receptionists, secretaries and assistants typically do not have the authority to change telecommunications services providers for the company.* If the person signing the LOA is different from the person with the actual authority to do so, you should attempt to contact the other person.

While this policy might jeopardize some sales orders, it should give you a chance to retain sales by demonstrating your concern and professionalism.

- Take your time. Review the LOA for accuracy and legibility, especially the telephone number. Confirm the person's telephone number
- **NEVER sign someone else's name on an LOA or any other document! Don't force a sale that is not there.**

ACKNOWLEDGEMENT BY DEALER

This will verify on behalf of ABC Telecom LLC, I have received, read, and understand the document entitled "WINDSTREAM POLICIES AND PROCEDURES REGARDING SLAMMING PREVENTION" ("Windstream Document"). Furthermore, I agree to distribute the Windstream Document to the individuals responsible for selling Windstream Services. We fully understand and appreciate our obligations as a Windstream Dealer not to engage in or facilitate the practice of "slamming" customers. We understand that Windstream will not tolerate occurrences of "slamming", and that Windstream will take whatever actions are necessary to protect against slamming, including without limitation, termination of the Dealer Agreement and enforcement of all applicable legal rights and remedies.

[Signature]
Signature of Dealer

Carol A. Sack
Printed Name

ABC Telecom LLC
Print Name of Company

03/08/10
Date

VENDOR INTAKE FORM

X New Vendor: Complete ALL information requested below.

Today's Date: 3/8/2011

Vendor Name (as shown on income tax return): ABS Telecom LLC

DBA or Acronyms used by Vendor: ABS Telecom LLC

Vendor is a/an: ☐ Individual ☒ Business entity

If Vendor is a business entity, provide type of entity (i.e. sole proprietor, Corporation, LLC, Partnership) and state of origination: Texas

Primary Contact Name: Gary Speck

Address (to be printed on PO): 6505 West Park Blvd. Suite 306 PMB # 130 ☐ Address Change

City: Plano State: Tx Zip Code: 75093

Tax ID Number (FEIN):

Telephone: 972-407-0063 Facsimile: 214-291-5901

E-mail: Gary@abstelecom.net Web Site Address: ABStelecom.net

NAICS Code

REDACTED

[Note: NAICS Code information can be found at www.naics.com]

* * * * *

SMALL BUSINESS CERTIFICATION

This section must be completed for Windstream's Federal and State Reporting Requirements:

Vendor ☐ does ☒ does not qualify as a small business enterprise pursuant to the Federal Acquisition Regulations ("FAR") and regulations of the U.S. Small Business Administration ("SBA"). [Note: *Small Business Size Standards can be found at Section 121.201, Title 13 of the Code of Federal Regulations ("CFR") or www.naics.com. See the Explanation page of this Form for more information on this requirement.*]

If Vendor qualifies as a small business enterprise, indicate below the type of small business enterprise (check all that are applicable):

☐ Veteran-owned small business

☐ Service-disabled veteran-owned small business

GLS

☐ HUB Zone small business

☐ Woman-owned small business

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☐ Small Disadvantaged Business (Including ANCs and Indian Tribes)

* * * * *

MINORITY, WOMAN AND DISABLED VETERAN-OWNED BUSINESS SECTION

This section must be completed for Windstream's Federal and State Reporting Requirements:

Business Category

Ethnicity

Business Type

☐ Minority-owned

☐ Native American/Alaskan Native

☐ Sole Proprietor

☐ Woman-owned

☐ Asian/Pacific Islander

☐ Corporation

☐ Disabled Veteran-owned

☐ Black/African American

☐ Public Agency/Non-Profit

☐ N/A --Not Applicable

☐ Caucasian/White

☐ LLC/LLP/Partnership

☐ Hispanic/Latino

* * * * *

FEDERAL GOVERNMENT CONTRACTORS EXCLUDED PARTIES LIST

Vendor represents that it: ☐ is ☒ is not presently suspended or debarred from doing business with the Federal Government. [See the Explanation page of this Form for more information on this requirement.]

* * * * *

VENDOR CERTIFICATION AND INDEMNIFICATION

By his/her/its signature below, Vendor hereby certifies that the information provided in this Form is accurate and complete. Should any information disclosed to Windstream in this Form change for any reason, Vendor acknowledges that he/she/it is obligated to submit immediately a new Form identifying the information that has changed. VENDOR HEREBY AGREES TO INDEMNIFY AND HOLD WINDSTREAM AND ITS AFFILIATES, OFFICERS AND EMPLOYEES HARMLESS FROM ANY AND ALL CLAIMS, CAUSES OF ACTION, DAMAGES AND PENALTIES, INCLUDING WITHOUT LIMITATION REASONABLE ATTORNEYS' FEES, RESULTING FROM VENDOR'S SUBMISSION OF INACCURATE OR INCOMPLETE INFORMATION ON THIS FORM.

Vendor Signature: _____

Title: Managing Partner

Print Name: Gary Speck

* * * * *

NOTE: NEW VENDORS MUST ALSO SUBMIT A COMPLETED W-9 FORM TO EFFECT PAYMENT



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Dealer Profile Form

3-30-10

Page 1 of 1

(Dealer Name must match Dealer Agreement and W-9)

Dealer Name: ABS Telecom LLC

Address: 6505 W. Park Blvd.

City/State/Zip: Plano, TX 75093

Phone: 972-407-0063

Fax: 214-291-5901

E-mail: Gary@abstelecom.net

FED Tax ID or SS #:

REDACTED

Authorized Signer (Please Print Name): Gary Speck

Principal Line of Business: Telecom Brokerage, Data Center Services, Cisco Hardware solutions

How did you find this Dealer: Called by Charles Bates

Where are their customers located? USA

Estimated Amount of NuVox MRR at end of 1st Year: Unknown

Other Sales Office Locations: 1

Total Number of Sales People: 3

District Dealer Manager: Charles Bates

Brief statement regarding why this Dealer qualifies to be a successful NuVox Dealer in your opinion:

ABS Telecom LLC has been in a Dealer since 2006, we are adding Wind stream because of the KDL footprint in our sales area of Our Tyler Texas Sales Office

PRIVATE/PROPRIETARY

Contains Private and/or Proprietary Information. May not be used or disclosed outside NuVox Communications except pursuant to a written agreement.

EXHIBIT 6

DATE	FACT
March 15, 2011	Windstream executed the Dealer Agreement with ABS
December 13, 2011	Mr. Speck traveled to Tyler, Texas to introduce Mr. Bates and Ms. Kadlacek to Dr. Mickey Slimp, Director of ETIHN and he reminded Dr. Slimp that ABS would be compensated by Windstream as a sales agent
February 12, 2015	Mrs. Speck sent a Form 465 for Hunt to Messrs. Mungeer, Dishon and Easley and reminded them that the Hunt project was an ABS project
March 30, 2015	Mr. Mungeer sent the Hunt Addendum to Mr. Speck and provided a copy to James E. Pearce of Windstream
January 16, 2016	Mr. Speck submitted a Form 465 (No. 43160643) for Hunt and subsequently called Mr. Mungeer and asked that Windstream bid on the Hunt project
February 12, 2016	According to Windstream, its "personnel responsible for managing the company's participation in universal service programs discovered that ABS may have been acting as a consultant for UTHSCT," and that it "immediately undertook an internal investigation"
April 19, 2016	Windstream completed its internal investigation
November 9, 2016	Mr. Loken responded to a USAC information request
January 6, 2017	Mr. Loken responded to a USAC information request
March 13, 2017	The RHCD sends the Further Explanation to Mr. Mungeer at Windstream Lincoln, Nebraska office address
May 11, 2017	Windstream represented to USAC that, prior to February 12, 2016, it did not know that ABS was acting as a consultant for the UTHSCT HCPs and that Mr. Speck was listed as the contact person on Form 465s submitted on behalf of HCPs for whom it was bidding to provide service
September 28, 2017	Windstream represented to USAC that, during its internal investigation, it interviewed "relevant personnel still employed by the company" but did not uncover evidence of any awareness of ABS' dual role prior to February 2016

EXHIBIT 7



Universal Service
Administrative Co.

Rural Health Care Division

Administrator's Decision on Rural Health Care Program Appeal

Via Electronic and Certified Mail

June 29, 2018

Mr. Matthew A. Brill
Ms. Elizabeth R. Park
Latham & Watkins LLP
555 Eleventh Street NW, Suite 1000
Washington, DC 20004

Cc: Ms. Amy Barnes
Windstream Communications, LLC
4001 Rodney Parham Rd, B1F01
Little Rock, AR 72212

Re: Windstream Communications - Appeal of USAC's
Decision for Funding Request Numbers Listed in Appendix A

Dear Mr. Brill:

The Universal Service Administrative Company (USAC) has completed its evaluation of the May 11, 2017 letter of appeal (Appeal) submitted on behalf of Windstream Communications, LLC (Windstream).¹ The funding request numbers (FRNs) that are the subject of the Appeal are listed in Appendices A and B, and relate to funding under the federal Universal Service Rural Health Care Telecommunications Program (Telecom Program).

On March 13, 2017, USAC denied requests for Telecom Program support submitted by The Burke Center – West Austin Street (Burke), Trinity Valley Community College (Trinity), and UTHSCT on behalf of ETIHN – Andrews Center (UTHSCT) (collectively, the Applicants) for funding years (FYs) 2012 through 2016.² The Appeal requests that USAC reverse its denials of the funding requests listed in the Appendices.³

USAC has reviewed the Appeal and the facts related to this matter and has determined that Federal Communications Commission (FCC or Commission) rules and requirements support the

¹ See Letter from Matthew A. Brill and Elizabeth R. Park, Latham & Watkins LLP on behalf of Windstream Communications, LLC to Rural Health Care Division, USAC (May 11, 2017) (Appeal).

² See Emails from Rural Health Care Division, USAC to Darlene Flournoy, The Burke Center – West Austin Street et al. (Mar. 13, 2017) (Administrator's Denials); Letter from Rural Health Care Division, USAC to Darlene Flournoy, The Burke Center – West Austin Street et al. (Mar. 13, 2017) (Further Explanation of Decision).

³ See Appeal at 2.

Mr. Matthew A. Brill
Ms. Elizabeth R. Park
Latham & Watkins LLP
June 29, 2018
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denials of the FRNs listed in the Appendices because the Applicants' selection of Windstream as the service provider for these funding requests was not the result of a fair and open competitive bidding process, and was therefore in violation of the Commission's requirements for the Telecom Program.⁴

Background

The Telecom Program provides eligible health care providers (HCPs) with universal service support for the difference between the urban and rural rates for eligible telecommunications services, subject to limitations set forth in the Commission's rules.⁵ FCC rules require HCPs to competitively bid the requested services and select the most cost-effective method of providing the requested service.⁶ Specifically, each HCP must make a bona fide request for eligible services by posting an FCC Form 465 to USAC's website for telecommunications carriers to review.⁷ The HCP must review all bids submitted in response to the FCC Form 465 and wait at least 28 days before entering into a service agreement with the selected service provider.⁸

The FCC further requires that the competitive bidding process be fair and open, and that the process not be compromised by improper conduct by the applicant, service provider, or both parties.⁹ Accordingly, a service provider participating in the competitive bidding process cannot be involved in the preparation of the HCP's FCC Form 465, request for proposal (RFP), or vendor selection process.¹⁰ Consultants or other parties working on behalf of the HCP who have an

⁴ See *Requests for Review of Decisions of the Universal Service Administrator by Hospital Networks Management, Inc. Manchaca, Texas*, WC Docket No. 02-60, Order, 31 FCC Rcd 5731, 5733, para. 4 (2016) (*Hospital Networks Management Order*) (citing *Federal-State Joint Board on Universal Services*, CC Docket No. 96-45, Report and Order, 12 FCC Rcd 8776, 9076, para. 480 (1997) (*Universal Service First Report and Order*) (subsequent history omitted) (requiring competitive bidding processes to be fair and open such that no bidders receive an unfair advantage); *Promoting Telehealth in Rural America*, WC Docket No. 17-310, Notice of Proposed Rulemaking and Order, FCC 17-164 at 28, para. 100 (OHMSV Dec. 18, 2017) (*2017 NPRM and Order*) ("[A] process that is not 'fair and open' is inherently inconsistent with 'competitive bidding.'"). Cf. *Schools and Libraries Universal Service Support Mechanism*, CC Docket Nos. 96-45 *et al.*, Third Report and Order and Second Further Notice of Proposed Rulemaking, 18 FCC Rcd 26912, 26939, para. 66 (2003) (*Schools and Libraries Third Report and Order*) (stating that a fair and open competitive bidding process is critical to preventing waste, fraud, and abuse of program resources). See generally, 47 C.F.R. 54.603(a).

⁵ See 47 C.F.R. §§ 54.602(a), 54.604(b).

⁶ See 47 C.F.R. §§ 54.603(a), (b)(4), 54.615(a).

⁷ See 47 C.F.R. § 54.603; see also FCC Form 465 Health Care Providers Universal Service Description of Services Requested & Certification Form, OMB 3060-0804 (Nov. 2012) (*FCC Form 465*).

⁸ 47 C.F.R. § 54.603(b)(3).

⁹ *Hospital Networks Management Order*, 31 FCC Rcd at 5733, para. 4.

¹⁰ *Id.* (citing *Schools and Libraries Universal Service Support Mechanism and A National Broadband Plan for Our Future*, Sixth Report and Order, CC Docket No. 02-6, 25 FCC Rcd 18762, 18799-800, para. 86 (2010) (*Schools and Libraries Sixth Report and Order*) ("an applicant violates the Commission's competitive bidding rules if the applicant turns over to a service provider the responsibility for ensuring a fair and open competitive bidding process")). See also *Request for Review by Mastermind Internet Services, Inc., et al.*, CC Docket No. 96-45, Order,

ownership interest, sales commission arrangement, or other financial stake with respect to a bidding service provider are also prohibited from performing any of those tasks on behalf of the HCP.¹¹ The FCC has further clarified that the individual listed as the contact person on the FCC Forms 465 may not be affiliated with a service provider that participates in the bidding process as a bidder.¹² As the FCC explained, the contact person influences an applicant's competitive bidding process by controlling the dissemination of information regarding the services requested, and a contact person that has a relationship with a prospective service provider may influence the competitive bidding process in two ways; either other prospective bidders may decide not to bid, or the contact person may not provide information to other bidders of the same type and quality that the contact person retains for its own use as a bidder.¹³ Further, the FCC has stated that any FCC Form 465 that lists as the contact person an employee or representative of a service provider that also participates in the bidding process as a bidder or is ultimately selected to provide the requested services is deemed defective and any funding requests arising from that form must be denied.¹⁴

Applicants' Funding Requests

Between April 20, 2012 and June 2, 2015, the Applicants submitted FCC Forms 465 requesting eligible services, which resulted in the selection of Windstream to provide services for the FRNs

16 FCC Rcd 4028 (2000) (*Mastermind Order*) (finding that the FCC Form 470 contact person influences an applicant's competitive bidding process by controlling the dissemination of information regarding the services requested and, when an applicant delegates that power to an entity that also participates in the bidding process as a prospective service provider, the applicant impairs its ability to hold a fair competitive bidding process); *Request for Review by Dickenson County Public Schools et al.*, CC Docket No. 96-45, 17 FCC Rcd 15747, 15748, para. 3 (2002) (noting that an applicant impairs its ability to hold a fair and open competitive bidding process when the applicant's FCC Form 470 contact person is also a service provider participating in the bidding process as a bidder); *Requests for Review of the Decision of the Universal Service Administrator by SEND Technologies, L.L.C.*, CC Docket No. 02-6, Order, 22 FCC Rcd 4950, 4951, para. 3 (Wireline Comp. Bur. 2007) (*SEND Order*) (citing *Mastermind Order*, 16 FCC Rcd at 4032-4033, paras 9-10).

¹¹ *Hospital Networks Management Order*, 31 FCC Rcd at 5733-34, para. 4 (citing *SEND Order*, 22 FCC Rcd 4950 (finding that where the applicant's contact person is also a partial owner of the selected service provider, the relationship between the applicant and the service provider creates a conflict of interest and impedes fair and open competition)).

¹² *Id.* at 5742, para. 20 (citing *Schools and Libraries Sixth Report and Order*, 25 FCC Rcd at 18799-800, para. 86 ("an applicant violates the Commission's competitive bidding rules if the applicant turns over to a service provider the responsibility for ensuring a fair and open competitive bidding process")).

¹³ See *SEND Order*, 22 FCC Rcd at 4952-53, para. 3 (citing *Mastermind Order*, 16 FCC Rcd at 4033, para. 11).

¹⁴ *Id.* (citing *Mastermind Order*, 16 FCC Rcd at 4032, para. 9). See also *Send Order*, 22 FCC Rcd at 4952-53, para. 3 ("[I]n the *Mastermind Order*, the Commission held that, where an FCC Form 470 lists a contact person who is an employee or representative of a service provider who participates in the competitive bidding process, the FCC Form 470 is defective."). In *Hospital Networks Management Order*, the FCC observed that the mechanics of the bidding processes in the rural health care and E-rate programs are effectively the same and that, like the FCC Form 470 in the E-rate program (i.e., the FCC Form inviting service providers to submit bids in response to an applicant's request for services), the rural health care program's FCC Form 465 describes the applicant's planned service requirements, as well as other information regarding the applicant and its competitive bidding process that may be relevant to the preparation of bids. See 31 FCC Rcd at 5741-42, para. 20.

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listed in the Appendices.¹⁵ The contact person listed on each of the FCC Forms 465 was Gary Speck, an employee of ABS Telecom, LLC (ABS Telecom).¹⁶

Based on its review and investigation, USAC determined that the relationship between Windstream and Mr. Gary Speck, the party who filed the FCC Forms 465 on behalf of the Applicants and whose employer, ABS Telecom, was listed as a vendor on at least one of the Applicants' service agreements with Windstream, created a conflict of interest that impaired the Applicants' ability to hold a fair and open competitive bidding process for the FRNs listed in the Appendices.¹⁷ Therefore, on March 13, 2017, USAC denied the funding requests because the Applicants' selection of Windstream as the service provider for these funding requests was not the result of a fair and open competitive bidding process, in violation of the FCC's requirements.¹⁸

Windstream's Appeal

On May 11, 2017, Windstream appealed USAC's denials of the FRNs listed in the Appendices.¹⁹ In the Appeal, Windstream acknowledges that it had a business relationship with Mr. Speck, owner and manager of ABS Telecom, arising from a channel partner agreement executed on March 15, 2011, under which ABS Telecom served as its sales agent by identifying business opportunities for Windstream.²⁰ However, Windstream argues that (1) USAC should reverse its decision to deny

¹⁵ See FCC Form 465 No. 43123237 for FY 2012 (Apr. 20, 2012); FCC Form 465 No. 43123240 for FY 2012 (Apr. 20, 2012); FCC Form 465 No. 43133868 for FY 2013 (May 16, 2013); FCC Form 465 No. 43144511 for FY 2014 (May 29, 2014); FCC Form 465 No. 43155659 for FY 2015 (Jun. 1, 2015); FCC Form 465 No. 43155674 for FY 2015 (Jun. 1, 2015); FCC Form 465 No. 43155889 for FY 2015 (Jun. 2, 2015).

¹⁶ See *id.*

¹⁷ On December 23, 2016, USAC sent information requests to Windstream and the Applicants requesting clarification or additional information to address certain issues or deficiencies USAC identified in the funding requests listed in Appendix A. See Email from Jeremy Matkovich, Program Analyst, USAC, to Darlene Flournoy, ETIHN Coordinator, Burke Center, Trinity, UTHSCT (Dec. 23, 2016); Email from Jeremy Matkovich, Program Analyst, USAC, to Tim Loken, Director Regulatory Reporting, Windstream (Dec. 23, 2016). In its response to USAC's December 23, 2016 information request, Windstream indicated that its monthly recurring charges for each of these funding requests included commissions paid to "Channel Partners" as compensation for identifying and bringing a customer to Windstream. See Letter from Tim Loken, Director Regulatory Reporting, Windstream, to USAC at 1 (Jan. 6, 2017). According to Windstream's website, ABS Telecom, LLC was named one of Windstream's "Elite Channel Partners" in 2014. See Windstream Website, Windstream Names 2014 Elite Channel Partners, available at <http://news.windstream.com/news-releases/news-release-details/windstream-announces-2014-elite-channel-partners> (last visited May 17, 2018). Based on this information, USAC found that Mr. Speck's role as the contact person listed on the Applicants' FCC Forms 465 and affiliation with Windstream created a conflict of interest that tainted the competitive bidding process for each of the funding requests in the Appendices. See Administrator's Denials; Further Explanation of Decision.

¹⁸ See Administrator's Denials; Further Explanation of Decision. To the extent USAC provided funding for the FRNs listed in the Appendices, it sought recovery of those funds in a separate letter. See Emails from Rural Health Care Division, USAC to Maribeth Everley, Windstream Communications, LLC (Oct. 23, 2017); Further Explanation of Decision at 2, nn. 2-3.

¹⁹ See Appeal.

²⁰ See *id.* at 3.

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funding to Windstream because Windstream was not responsible for any conflict of interest;²¹ (2) USAC should direct any recovery action towards ABS;²² and (3) constitutional and equitable considerations militate against depriving Windstream of funding.²³ We address each of these arguments below.

ARGUMENT 1 - USAC should reverse its decision to deny funding to Windstream because Windstream was not responsible for any conflict of interest.

First, Windstream argues that USAC should not have denied funding for the FRNs listed in the Appendices because Windstream was not responsible for the conflict of interest that violated the FCC's competitive bidding requirements.²⁴ However, this claim is incorrect. USAC was required to deny the Applicants' funding requests because the support requested was for services procured through a competitive bidding process that was not "fair and open," in violation of the FCC's competitive bidding requirements.²⁵ Specifically, the relationship between Windstream and Mr. Speck, who filed the FCC Forms 465 on behalf of the Applicants and whose employer, ABS Telecom, was contracted by Windstream to serve as its sales agent by identifying business opportunities, created a conflict of interest that undermined the competitive bidding process for the FRNs listed in the Appendices.²⁶ As previously stated, consultants who have a financial stake with respect to a bidding service provider may not be involved in the preparation of the FCC Forms 465 for the HCPs competitively bidding requested services under the Telecom Program because such involvement constitutes a conflict of interest that impairs the HCPs' ability to hold a fair and open competitive bidding process.²⁷ Mr. Speck's dual role as the HCPs' consultant and Windstream's sales agent created a conflict of interest that impeded fair and open competition, in violation of the FCC's competitive bidding requirements. Even if, as Windstream claims, it was not responsible for the conflict of interest in this case, FCC precedent requires USAC to deny funding requests where there is improper involvement of a bidding service provider's employee or representative in the preparation of the underlying FCC Forms 465.²⁸ Therefore, it was appropriate for USAC to deny the funding requests listed in the Appendices.

²¹ *Id.* at 6.

²² *Id.* at 11.

²³ *Id.* at 12.

²⁴ *See* Appeal at 6.

²⁵ *See supra* note 4.

²⁶ *See* Further Explanation of Decision at 6.

²⁷ *See supra* note 11.

²⁸ *See supra* note 14. Because the question of whether Windstream was responsible for the conflict of interest is relevant only to USAC's recovery of Telecom Program support committed to the Applicants, and not to its denial of their funding requests, which was required by FCC precedent regardless of which party caused the competitive bidding violation, USAC will address this question in its response to Windstream's appeal of USAC's adjustment of the Applicants' funding commitments, and not in the instant decision. *See id.*; Letter from Matthew A. Brill and Elizabeth R. Park, Latham & Watkins LLP on behalf of Windstream Communications, LLC to Rural Health Care Division, USAC (Dec. 19, 2017) (Windstream COMAD Appeal).

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ARGUMENT 2 - USAC should direct any recovery action toward ABS.

Next, Windstream argues that, to the extent there was a violation of the FCC's competitive bidding rules and requirements governing the Telecom Program, USAC should seek recovery of improperly disbursed funding from ABS Telecom.²⁹ However, this claim is not relevant to USAC's denial of the FRNs listed in the Appendices, which was required by FCC precedent irrespective of any separate action by USAC to recover previously committed funds.³⁰ Therefore, we do not address this argument in the instant decision.

ARGUMENT 3 - Constitutional and equitable considerations militate against depriving Windstream of funding.

Finally, Windstream argues that USAC's denial of funding for the FRNs listed in the Appendices raises constitutional and equitable concerns.³¹ Because these issues are questions of policy, and USAC is not authorized to make policy, we do not address these claims.³²

Administrator's Decision on Appeal

USAC is unable to grant the Appeal because Mr. Speck's dual role as a consultant for the Applicants and channel partner for Windstream created a conflict of interest that tainted the competitive bidding process for the FRNs listed in the Appendices. Therefore, because the competitive bidding process that resulted in the Applicants' selection of Windstream as the service provider for these funding requests was not fair and open, in violation of the FCC's rules,³³ USAC denies the Appeal.

If you wish to appeal this decision or request a waiver, you can follow the instructions pursuant to 47 C.F.R. Part 54, Subpart I (47 C.F.R. §§ 54.719 to 725). Further instructions for filing appeals or requesting waivers are available at: <http://www.usac.org/about/about/program-integrity/appeals.aspx>.

²⁹ See Appeal at 11.

³⁰ See *supra* note 14. USAC will address the question of whether it should seek recovery of previously committed funds from ABS Telecom in its response to Windstream's appeal of USAC's adjustment of the Applicants' funding commitments. See Windstream COMAD Appeal.

³¹ See Appeal at 12.

³² See generally, 47 C.F.R. § 54.702(c) ("[USAC] may not make policy, interpret unclear provisions of the statute or rules, or interpret the intent of Congress."); 47 C.F.R. § 1.3 ("The provisions of this chapter may be suspended, revoked, amended, or waived for good cause shown, in whole or in part, at any time by the Commission, subject to the provisions of the Administrative Procedures Act and the provisions of this chapter.").

³³ See *supra* note 4.

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Sincerely,

/s/ Universal Service Administrative Company

cc: William L. Elliott, Windstream Communications, LLC

EXHIBIT 8



Universal Service
Administrative Co.

Rural Health Care Division

Administrator's Decision on Rural Health Care Program Appeal

Via Electronic and Certified Mail

June 29, 2018

Mr. Matthew A. Brill
Ms. Elizabeth R. Park
Latham & Watkins LLP
555 Eleventh Street NW, Suite 1000
Washington, DC 20004

Cc: Ms. Amy Barnes
Windstream Communications, LLC
4001 Rodney Parham Rd, B1F01
Little Rock, AR 72212

Re: Windstream Communications - Appeal of USAC's
Decision for Funding Request Numbers Listed in Appendix A

Dear Mr. Brill:

The Universal Service Administrative Company (USAC) has completed its evaluation of the December 19, 2017 letter of appeal (Appeal) submitted on behalf of Windstream Communications, LLC (Windstream).¹ The funding request numbers (FRNs) that are the subject of the Appeal are listed in Appendix A, and they relate to funding under the federal Universal Service Rural Health Care Telecommunications Program (Telecom Program).

On October 23, 2017, USAC issued Commitment Adjustment Letters (COMADs) to Windstream, adjusting Telecom Program funding committed to The Burke Center – West Austin Street (Burke), Trinity Valley Community College (Trinity), and UTHSCT on behalf of ETIHN – Andrews Center (UTHSCT) (collectively, the Applicants), including recovery from Windstream of any funding improperly disbursed, for funding years (FYs) 2012 through 2015.² The Appeal requests that USAC reverse these funding adjustments.³

¹ See Letter from Matthew A. Brill and Elizabeth R. Park, Latham & Watkins LLP on behalf of Windstream Communications, LLC to Rural Health Care Division, USAC (Dec. 19, 2017) (Appeal).

² See Emails from Rural Health Care Division, USAC to Maribeth Everley, Windstream Communications, LLC (Oct. 23, 2017) (Administrator's COMADs) (adjusting the Applicants' commitments based on USAC's finding that the competitive bidding process that resulted in the selection of Windstream as the service provider for Applicants' funding requests was not fair and open, as required by the FCC).

³ See Appeal at 1.

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USAC has reviewed the Appeal and the facts related to this matter and has determined that Federal Communications Commission (FCC or Commission) rules and requirements support the funding adjustments for the FRNs listed in Appendix A because the Applicants' selection of Windstream as the service provider for these funding requests was not the result of a fair and open competitive bidding process, and was therefore in violation of the Commission's requirements for the Telecom Program.⁴

Background

The Telecom Program provides eligible health care providers (HCPs) with universal service support for the difference between the urban and rural rates for eligible telecommunications services, subject to limitations set forth in the Commission's rules.⁵ FCC rules require HCPs to competitively bid the requested services and select the most cost-effective method of providing the requested service.⁶ Specifically, each HCP must make a bona fide request for eligible services by posting an FCC Form 465 to USAC's website for telecommunications carriers to review.⁷ The HCP must review all bids submitted in response to the FCC Form 465 and wait at least 28 days before entering into a service agreement with the selected service provider.⁸

The FCC further requires that the competitive bidding process be fair and open, and that the process not be compromised by improper conduct by the applicant, service provider, or both parties.⁹ Accordingly, a service provider participating in the competitive bidding process cannot be involved in the preparation of the HCP's FCC Form 465, request for proposal (RFP), or vendor selection process.¹⁰ Consultants or other parties working on behalf of the HCP who have an

⁴ See *Requests for Review of Decisions of the Universal Service Administrator by Hospital Networks Management, Inc. Manchaca, Texas*, WC Docket No. 02-60, Order, 31 FCC Rcd 5731, 5733, para. 4 (2016) (*Hospital Networks Management Order*) (citing *Federal-State Joint Board on Universal Services*, CC Docket No. 96-45, Report and Order, 12 FCC Rcd 8776, 9076, para. 480 (1997) (*Universal Service First Report and Order*) (subsequent history omitted) (requiring competitive bidding processes to be fair and open such that no bidders receive an unfair advantage); *Promoting Telehealth in Rural America*, WC Docket No. 17-310, Notice of Proposed Rulemaking and Order, FCC 17-164 at 28, para. 100 (OHMSV Dec. 18, 2017) (*2017 NPRM and Order*) ("[A] process that is not 'fair and open' is inherently inconsistent with 'competitive bidding.'"). Cf. *Schools and Libraries Universal Service Support Mechanism*, CC Docket Nos. 96-45 et al., Third Report and Order and Second Further Notice of Proposed Rulemaking, 18 FCC Rcd 26912, 26939, para. 66 (2003) (*Schools and Libraries Third Report and Order*) (stating that a fair and open competitive bidding process is critical to preventing waste, fraud, and abuse of program resources). See generally, 47 C.F.R. 54.603(a).

⁵ See 47 C.F.R. §§ 54.602(a), 54.604(b).

⁶ See 47 C.F.R. §§ 54.603(a), (b)(4), 54.615(a).

⁷ See 47 C.F.R. § 54.603; see also FCC Form 465 Health Care Providers Universal Service Description of Services Requested & Certification Form, OMB 3060-0804 (Nov. 2012) (*FCC Form 465*).

⁸ 47 C.F.R. § 54.603(b)(3).

⁹ *Hospital Networks Management Order*, 31 FCC Rcd at 5733, para. 4.

¹⁰ *Id.* (citing *Schools and Libraries Universal Service Support Mechanism and A National Broadband Plan for Our Future*, Sixth Report and Order, CC Docket No. 02-6, 25 FCC Rcd 18762, 18799-800, para. 86 (2010) (*Schools and*

ownership interest, sales commission arrangement, or other financial stake with respect to a bidding service provider are also prohibited from performing any of those tasks on behalf of the HCP.¹¹ The FCC has further clarified that the individual listed as the contact person on the FCC Form 465 may not be affiliated with a service provider that participates in the bidding process as a bidder.¹² As the FCC explained, the contact person influences an applicant's competitive bidding process by controlling the dissemination of information regarding the services requested, and a contact person that has a relationship with a prospective service provider may influence the competitive bidding process in two ways; either other prospective bidders may decide not to bid, or the contact person may not provide information to other bidders of the same type and quality that the contact person retains for its own use as a bidder.¹³ Further, the FCC has stated that any FCC Form 465 that lists as the contact person an employee or representative of a service provider that also participates in the bidding process as a bidder or is ultimately selected to provide the requested services is deemed defective and any funding requests arising from that form must be denied.¹⁴ To

Libraries Sixth Report and Order) ("an applicant violates the Commission's competitive bidding rules if the applicant turns over to a service provider the responsibility for ensuring a fair and open competitive bidding process"). See also *Request for Review by Mastermind Internet Services, Inc., et al.*, CC Docket No. 96-45, Order, 16 FCC Rcd 4028 (2000) (*Mastermind Order*) (finding that the FCC Form 470 contact person influences an applicant's competitive bidding process by controlling the dissemination of information regarding the services requested and, when an applicant delegates that power to an entity that also participates in the bidding process as a prospective service provider, the applicant impairs its ability to hold a fair competitive bidding process); *Request for Review by Dickenson County Public Schools et al.*, CC Docket No. 96-45, 17 FCC Rcd 15747, 15748, para. 3 (2002) (noting that an applicant impairs its ability to hold a fair and open competitive bidding process when the applicant's FCC Form 470 contact person is also a service provider participating in the bidding process as a bidder); *Requests for Review of the Decision of the Universal Service Administrator by SEND Technologies, L.L.C.*, CC Docket No. 02-6, Order, 22 FCC Rcd 4950, 4951, para. 3 (Wireline Comp. Bur. 2007) (*SEND Order*) (citing *Mastermind Order*, 16 FCC Rcd at 4032-4033, paras 9-10).

¹¹ *Hospital Networks Management Order*, 31 FCC Rcd at 5733-34, para. 4 (citing *SEND Order*, 22 FCC Rcd 4950 (finding that where the applicant's contact person is also a partial owner of the selected service provider, the relationship between the applicant and the service provider creates a conflict of interest and impedes fair and open competition)).

¹² *Id.* at 5742, para. 20 (citing *Schools and Libraries Sixth Report and Order*, 25 FCC Rcd at 18799-800, para. 86 ("an applicant violates the Commission's competitive bidding rules if the applicant turns over to a service provider the responsibility for ensuring a fair and open competitive bidding process"))).

¹³ See *SEND Order*, 22 FCC Rcd at 4952-53, para. 3 (citing *Mastermind Order*, 16 FCC Rcd at 4033, para. 11).

¹⁴ *Id.* (citing *Mastermind Order*, 16 FCC Rcd at 4032, para. 9). See also *Send Order*, 22 FCC Rcd at 4952-53, para. 3 ("[I]n the *Mastermind Order*, the Commission held that, where an FCC Form 470 lists a contact person who is an employee or representative of a service provider who participates in the competitive bidding process, the FCC Form 470 is defective."). In *Hospital Networks Management Order*, the FCC observed that the mechanics of the bidding processes in the rural health care and E-rate programs are effectively the same and that, like the FCC Form 470 in the E-rate program (i.e., the FCC Form inviting service providers to submit bids in response to an applicant's request for services), the rural health care program's FCC Form 465 describes the applicant's planned service requirements, as well as other information regarding the applicant and its competitive bidding process that may be relevant to the preparation of bids. See 31 FCC Rcd at 5741-42, para. 20.

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the extent support has been improperly committed and/or disbursed, USAC must recover such funds through its normal processes.¹⁵

Applicants' Funding Requests and Commitments

On March 8, 2012, August 29, 2013, and December 13, 2013, respectively, Trinity, Burke, and UTHSCT submitted FCC Forms 465 requesting eligible services, which resulted in the selection of Windstream to provide services for the FRNs listed in Appendix A.¹⁶ The contact person listed on each of the FCC Forms 465 was Gary Speck, an employee of ABS Telecom, LLC (ABS Telecom).¹⁷ Between March 12, 2013 and May 11, 2016, USAC issued funding commitment letters (FCLs) to the Applicants for these funding requests for FYs 2012 through 2015.¹⁸

Based on its subsequent review and investigation, USAC determined that the relationship between Windstream and Mr. Gary Speck, the party who filed the FCC Forms 465 on behalf of the Applicants and whose employer, ABS Telecom, LLC (ABS Telecom), was listed as a vendor on at least one of the Applicants' service agreements with Windstream, created a conflict of interest that impaired the Applicants' ability to hold a fair and open competitive bidding process for the FRNs listed in Appendix A.¹⁹ Therefore, on October 23, 2017, USAC issued COMADs to Windstream,

¹⁵ See *Comprehensive Review of the Universal Service Fund Management, Administration, & Oversight, Federal-State Joint Board on Universal Service Schools & Libraries Universal Service Support Mechanism, Rural Health Care Support Mechanism, Lifeline & Link-Up Changes to the Board of Directors for the National Exchange Carrier Association, Inc.*, WC Docket Nos. 05-195, 02-60, and 03-109, CC Docket Nos. 96-45, 02-6, and 97-21, Report and Order, 22 FCC Rcd 16372, 16386, para. 30 (2007) ("[F]unds disbursed from the high-cost, low-income, and rural health care support mechanisms in violation of a Commission rule that implements the statute or a substantive program goal should be recovered."). Cf. *Changes to the Board of Directors of the National Exchange Carrier Association, Inc. Federal-State Joint Board on Universal Service*, CC Docket Nos. 96-45 and 97-21, Order, 15 FCC Rcd. 7197, 7200, para. 8 (1999) (*Commitment Adjustment Order*) (finding that Congress requires the Commission to recover monies erroneously disbursed under the E-rate program); *Changes to Board of Directors of the National Exchange Carrier Association, Inc.*, CC Docket No. 97-21, Order, 15 FCC Rcd. 22975, 22977, para. 3 (2000) ("As explained in the *Commitment Adjustment Order*, both the Debt Collection Improvement Act (DCIA) and the Commission's rules require collection of any disbursements it made in violation of the Act.").

¹⁶ See FCC Form 465 No. 113152 for FY 2011 (Mar. 8, 2012); FCC Form 465 No. 43137856 for FY 2013 (Aug. 29, 2013); FCC Form 465 No. 43139560 for FY 2013 (Dec. 13, 2013).

¹⁷ See *id.*

¹⁸ See FCLs listed in Appendix A.

¹⁹ On December 23, 2016, USAC sent information requests to Windstream and the Applicants requesting clarification or additional information to address certain issues or deficiencies USAC identified in certain funding requests submitted by Applicants for FY 2015. See Email from Jeremy Matkovich, Program Analyst, USAC, to Darlene Flournoy, ETIHN Coordinator, Burke Center, Trinity, UTHSCT (Dec. 23, 2016); Email from Jeremy Matkovich, Program Analyst, USAC, to Tim Loken, Director Regulatory Reporting, Windstream (Dec. 23, 2016). In its response to USAC's December 23, 2016 information request, Windstream indicated that its monthly recurring charges for each these FY 2015 funding requests included commissions paid to "Channel Partners" as compensation for identifying and bringing a customer to Windstream. See Letter from Tim Loken, Director Regulatory Reporting, Windstream, to USAC at 1 (Jan. 6, 2017). According to Windstream's website, ABS Telecom, LLC was named one of Windstream's "Elite Channel Partners" in 2014. See Windstream Website, Windstream Names 2014 Elite Channel Partners, available at <http://news.windstream.com/news-releases/news-release-details/windstream-announces-2014-elite-channel-partners> (last visited May 17, 2018). Based this information, USAC found that Mr.

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seeking adjustment of funding committed for the FRNs listed in Appendix A because the Applicants' selection of Windstream as the service provider for these funding requests was not the result of a fair and open competitive bidding process, in violation of the FCC's requirements.²⁰

Windstream's Appeal

On December 19, 2017, Windstream appealed USAC's adjustment of funding for the FRNs listed in Appendix A.²¹ In the Appeal, Windstream acknowledges that it had a business relationship with Mr. Speck, owner and manager of ABS Telecom, arising from a channel partner agreement executed on March 15, 2011, under which ABS Telecom served as its sales agent by identifying business opportunities for Windstream.²² However, Windstream argues that (1) the current rules applicable to the Telecom Program do not contain the "fair and open" competitive bidding rules USAC contends were violated;²³ (2) USAC should reverse its decision to deny funding to Windstream because Windstream did not violate any "fair and open" competitive bidding requirements;²⁴ (3) if USAC finds that competitive bidding rules were violated, notwithstanding that the FCC only now is proposing to adopt such requirements, USAC should direct any recovery action towards ABS;²⁵ and (4) constitutional and equitable considerations militate against depriving Windstream of funding.²⁶ We address each of these arguments below.

ARGUMENT 1 - The current rules applicable to the Telecom Program do not contain the "fair and open" competitive bidding rules USAC contends were violated.

First, Windstream argues that Telecom Program rules do not require the HCP's selection of a service provider to be the result of a competitive bidding process that is fair and open.²⁷ To support its claim that this standard is inapplicable to the Applicants' competitive bidding processes, Windstream cites the *2017 NPRM and Order*, in which the FCC proposed the adoption of new rules codifying the fair and open competitive bidding requirement in the Telecom Program.²⁸

Speck's role as the contact person listed on the Applicants' FCC Forms 465 and affiliation with Windstream created a conflict of interest that tainted the competitive bidding process for all funding requests associated with these forms, including the FRNs listed in Appendix A. See Email from Rural Health Care Division, USAC to Windstream et al. (Mar. 13, 2017) (Administrator's Denials); Letter from Craig Davis, USAC to Darlene Flournoy, The Burke Center – West Austin Street et al. (Mar., 13, 2017) (Further Explanation of Decision); Administrator's COMADs at 4.

²⁰ See Administrator's COMADs at 4.

²¹ See Appeal.

²² See *id.* at 3-4.

²³ *Id.* at 7.

²⁴ *Id.* at 8.

²⁵ *Id.* at 13.

²⁶ *Id.* at 15.

²⁷ See *id.* at 7.

²⁸ See Appeal at 7-8; *2017 NPRM and Order* at 28, para. 100.

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Specifically, Windstream argues that this proposal constitutes an acknowledgment by the FCC that this requirement does not currently apply to competitive bidding in the Telecom Program.²⁹

We reject Windstream's arguments. Although Windstream is correct that the requirement has not been codified in existing Telecom Program rules, the FCC has consistently held that the competitive bidding process that results in the selection of a service provider in the Telecom Program must be fair and open.³⁰ The FCC also explicitly acknowledged in the *2017 NPRM and Order* that the formal adoption of rules codifying the fair and open standard in the Telecom Program would merely codify its existing competitive bidding requirements,³¹ and noted that a process that is not "fair and open" is inherently inconsistent with "competitive bidding."³² Further, the Commission has applied the fair and open competitive bidding requirement in its decisions to determine whether HCPs' selection of a service provider in individual cases complied with Telecom Program requirements, despite the lack of a formal rule codifying this requirement.³³ Therefore, USAC rejects this argument.

ARGUMENT 2 -USAC should reverse its decision to deny funding to Windstream because Windstream did not violate any "fair and open" competitive bidding requirements.

Second, Windstream argues that USAC should not adjust the funding for the FRNs listed in Appendix A because Windstream did not violate the FCC's competitive bidding requirements.³⁴ However, this claim is incorrect. USAC was required to adjust the Applicants' funding commitments because the support was for services procured through a competitive bidding process that was not "fair and open," in violation of the FCC's competitive bidding requirements.³⁵ Specifically, the relationship between Windstream and Mr. Speck, who filed the FCC Forms 465 on behalf of the Applicants and whose employer, ABS Telecom, was contracted by Windstream to serve as its sales agent by identifying business opportunities, created a conflict of interest that undermined the competitive bidding process for the FRNs listed in the Appendices.³⁶ As previously stated, consultants who have a financial stake with respect to a bidding service provider

²⁹ See Appeal at 7.

³⁰ *Hospital Networks Management Order*, 31 FCC Rcd at 5733, para. 4 (citing *Mastermind Order*, 16 FCC Rcd at 4033, para. 10). See *id.* at 5731 ("The principles underlying the *Mastermind Order* and other orders addressing fair and open competitive bidding not only apply to the E-rate program (more formally known as the schools and libraries universal service program), but also to participants in the rural health care program.").

³¹ See *2017 NPRM and Order* at 28, para. 100 ("Because we are merely proposing to codify an existing requirement, RHC Program participants that are already complying with our competitive bidding rules should not be impacted.").

³² *Id.* (citing *Universal Service First Report and Order*, 12 FCC Rcd 8776).

³³ See, e.g. *Hospital Networks Management Order*, 31 FCC Rcd 5731 (finding a violation of the Commission's competitive bidding requirements where the Telecom Program applicant's competitive bidding process was not "fair and open"). See also *id.* at 5741, para. 18 n.84 (citing *Mastermind Order*, 16 FCC Rcd at 4032-33, para. 10 (concluding that a competitive bidding violation occurred despite the lack of a specific rule addressing the facts at issue)).

³⁴ See Appeal at 8.

³⁵ See *supra* note 4.

³⁶ See Further Explanation of Decision at 6.

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may not be involved in the preparation of the FCC Forms 465 for the HCPs competitively bidding requested services under the Telecom Program because involvement impairs the HCPs' ability to hold a fair and open competitive bidding process.³⁷ Therefore, Mr. Speck's dual role as the HCPs' consultant and Windstream's sales agent created a conflict of interest that impeded fair and open competition, in violation of the FCC's competitive bidding requirements.

USAC also finds that Windstream was responsible for the competitive bidding violation because it was aware of its business relationship with Mr. Speck through its channel partner agreement with ABS Telecom, and nevertheless submitted bids in response to FCC Forms 465 that listed Mr. Speck as the contact person for the Applicants. As Windstream acknowledges in the Appeal, "recovery actions should be directed to the party or parties that committed the rule or statutory violation in question."³⁸ In this case, Windstream was aware of the facts surrounding the conflict of interest at issue, but nevertheless submitted a bid in response to the Applicants' FCC Forms 465. When there is evidence of a conflict of interest under these circumstances, FCC precedent requires USAC to seek recovery from the service provider.³⁹ Therefore, it was appropriate for USAC to seek recovery of any improperly disbursed funding from Windstream.

ARGUMENT 3 - If USAC finds that competitive bidding rules were violated, notwithstanding that the FCC only now is proposing to adopt such requirements, USAC should direct any recovery action towards ABS.

Next, Windstream argues that, to the extent there was a violation of the FCC's competitive bidding rules and requirements governing the Telecom Program, USAC should seek recovery of improperly disbursed funding from ABS Telecom.⁴⁰ However, this claim is incorrect because the FCC requires USAC to seek recovery from the applicant, the service provider, or both, depending on the facts of the case, and USAC is not authorized to recover support from third parties like ABS Telecom.⁴¹ In this case, as previously stated, Windstream was aware of the facts surrounding the

³⁷ See *supra* note 11.

³⁸ *Federal-State Joint Board on Universal Service*, CC Docket Nos. 96-45, 97-21, and 02-60, Order on Reconsideration and Fourth Report and Order, 19 FCC Rcd 15252, 15257, para. 15 (2004) (*Schools and Libraries Fourth Report and Order*). See Appeal at 10.

³⁹ See, e.g., *SEND Order*, 22 FCC Rcd 4950 (directing USAC to recover from the service provider because the relationship between the applicant's contact person and the service provider involved a conflict of interest that impeded fair and open competition); *Requests for Review of Decisions of the Universal Service Administrator by Achieve Telecom Network of Ma Canton, Ma*, CC Docket No. 02-6, Order, 30 FCC Rcd. 3653, 3654, para. 3 n.7. (2015) (directing USAC to discontinue its recovery actions against the applicants, and seek recovery only from the service provider because it was in a better position to prevent the competitive bidding violation and there was no evidence that the applicants knew of, or could have discovered, the scheme that resulted in the service provider receiving an unfair advantage in the competitive bidding process).

⁴⁰ See Appeal at 13.

⁴¹ See *Schools and Libraries Fourth Report and Order*, 19 FCC Rcd at 15257, para. 15 (directing USAC to determine whether recovery should be directed to the beneficiary, the service provider, or both); *Rural Health Care Support Mechanism*, WC Docket No. 02-60, Report and Order, 27 FCC Rcd 16678, 16814, para. 339 (2012)

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conflict of interest at issue, but nevertheless submitted a bid in response to the Applicants' FCC Forms 465. Therefore, FCC precedent requires USAC to seek recovery of any improperly disbursed funding from Windstream.⁴²

ARGUMENT 4 - Constitutional and equitable considerations militate against depriving Windstream of funding.

Finally, Windstream argues that USAC's recovery of funding for the FRNs listed in Appendix A raises constitutional and equitable concerns.⁴³ Because these issues are questions of policy, and USAC is not authorized to make policy, we do not address these claims.⁴⁴

Administrator's Decision on Appeal

USAC is unable to grant the Appeal because Mr. Speck's dual role as a consultant for the Applicants and channel partner for Windstream created a conflict of interest that tainted the competitive bidding process for the FRNs listed in Appendix A. Therefore, because the competitive bidding process that resulted in the Applicants' selection of Windstream as the service provider for these funding requests was not fair and open, in violation of the FCC's rules,⁴⁵ USAC denies the Appeal.

If you wish to appeal this decision or request a waiver, you can follow the instructions pursuant to 47 C.F.R. Part 54, Subpart I (47 C.F.R. §§ 54.719 to 725). Further instructions for filing appeals or requesting waivers are also available at: <http://www.usac.org/about/about/program-integrity/appeals.aspx>.

Sincerely,

/s/ Universal Service Administrative Company

cc: William L. Elliott, Windstream Communications, LLC

("Recovery of funds will be directed at the party or parties (including both *beneficiaries and vendors*) who have committed the statutory or rule violation.") (emphasis added).

⁴² See *supra* note 39.

⁴³ See Appeal at 15.

⁴⁴ See generally, 47 C.F.R. § 54.702(c) ("[USAC] may not make policy, interpret unclear provisions of the statute or rules, or interpret the intent of Congress."); 47 C.F.R. § 1.3 ("The provisions of this chapter may be suspended, revoked, amended, or waived for good cause shown, in whole or in part, at any time by the Commission, subject to the provisions of the Administrative Procedures Act and the provisions of this chapter.").

⁴⁵ See *supra* note 4.

EXHIBIT 9

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LLGS LUKAS
LAFURIA
GUTIERREZ
& SACHS LLP

July 3, 2018

VIA EMAIL & U.S. MAIL

Lisa Pilgrim
Universal Service Administrative Co.
Rural Health Care Division
700 12th Street, N.W., Suite 900
Washington, D.C. 20005

Re: Appeal of ABS Telecom LLC

Dear Ms. Pilgrim:

Thank you for sending me a copy of the decision of the Rural Health Care Division ("RHCD") denying the appeal that my clients, ABS Telecom LLC ("ABS") and Mr. Gary Speck, submitted with respect to the denial of certain funding requests that were filed on behalf of The Burke Center – West Austin Street, Trinity Valley Community College, and UTHSCT on behalf of ETIHN – Andrews Center (collectively, "the HCPs"). I noted, however, that a copy of the RHCD's decision was apparently not served on Windstream Communications, LLC ("Windstream"), which also appealed the denial of the HCPs' funding requests. Because Windstream was clearly entitled to such service under the Commission's *ex parte* rules, I emailed a copy of the decision to Windstream's counsel.

Since the Windstream and ABS appeals involve substantially the same issues, and present conflicting claims, I expected that the RHCD would consolidate the appeals and act on them simultaneously. Therefore, I was surprised when the RHCD's decision only addressed the ABS appeal. However, if the RHCD has issued a decision on the Windstream appeal, but failed to serve the decision on me, please do so posthaste. If the RHCD has not acted on that appeal, please give me a copy of the decision as soon as it is issued.

Thank you for your cooperation.

Very truly yours,

/s/ Russell D. Lukas

Russell D. Lukas

cc: Matthew A. Brill Colleen Boothby
Elizabeth R. Park Elizabeth Lyle
Stephen J. Rosen Andrea Kearney

EXHIBIT 10

Via Electronic Mail

August 9, 2018

Mr. Russell D. Lukas
Lukas, Lafuria, Gutierrez, and Sachs, LLP
8300 Greensboro Dr., Suite 1200
Tysons, VA 22102

Re: Appeal of ABS Telecom LLC

Dear Mr. Lukas:

This is in response to your letter dated July 3, 2018, regarding the Universal Service Administrative Company's (USAC) decision on the appeal filed by Windstream Communications, LLC (Windstream). In your letter, you request that USAC provide you with a copy of the decision on the appeal filed by Windstream. You indicate that you have provided Windstream's counsel with a copy of USAC's decision on the appeal filed by ABS Telecom, and that Windstream was entitled to receive this under the Commission's *ex parte* rules.

USAC is unable to share with you a copy of the appeal decision issued to Windstream. As the Commission's *ex parte* rules do not apply to decisions made by USAC, ABS Telecom is not entitled to a copy of the decision on the appeal filed by Windstream. If you would still like a copy of the appeal decision letter issued to Windstream, you can either request this documentation from Windstream or, alternatively, submit a Freedom of Information Act (FOIA) request in accordance with the requirements set forth in 47 C.F.R. § 0.461.

Additional information regarding FOIA requests, including how to file a request, is available on the FCC's website (see <https://www.fcc.gov/general/foia-0>). If a FOIA request is filed, the FCC will review the request to determine what information may be released and, pursuant to 47 C.F.R. § 0.461(g)(1), "will make every effort to act on the requested within twenty business days after it is received and date-stamped by the FOIA Control office." With respect to any FOIA requests, please note that specific questions regarding the timeframe for a response should be directed to the FCC.

Sincerely,

/s/ Tori Schwetz
Manager of Program Risk and Compliance

EXHIBIT 11

EXISTING § 54.603	PROPOSED § 54.603
<p>§54.603 Competitive bidding and certification requirements.</p> <p>(a) <i>Competitive bidding requirement.</i> To select the telecommunications carriers that will provide services eligible for universal service support to it under the Telecommunications Program, each eligible health care provider shall participate in a competitive bidding process pursuant to the requirements established in this section and any additional and applicable state, Tribal, local, or other procurement requirements.</p> <p>(b) <i>Posting of FCC Form 465.</i> (1) An eligible health care provider seeking to receive telecommunications services eligible for universal service support under the Telecommunications Program shall submit a completed FCC Form 465 to the Administrator. FCC Form 465 shall be signed by the person authorized to order telecommunications services for the health care provider and shall include, at a minimum, that person's certification under oath that:</p> <p>(i) The requester is a public or non-profit entity that falls within one of the seven categories set forth in the definition of health care provider, listed in §54.600(a);</p> <p>(ii) The requester is physically located in a rural area;</p> <p>(iii) [Reserved]</p> <p>(iv) The requested service or services will be used solely for purposes reasonably related to the provision of health care services or instruction that the health care provider is legally authorized to provide under the law in the state in which such health care services or instruction are provided;</p>	<p>§ 54.603 Competitive bidding and certification requirements and exemptions.</p> <p>(a) <i>Competitive bidding requirement.</i> All applicants are required to engage in a competitive bidding process for services eligible for universal service support under the Telecommunications Program consistent with the requirements set forth in this subpart, unless they qualify for an exemption in paragraph (i) of this subpart. Applicants may engage in competitive bidding even if they qualify for an exemption. Applicants who utilize a competitive bidding exemption may proceed directly to filing a funding request as described in § 54.610.</p> <p>(b) <i>Fair and open process.</i> (1) All entities participating in the Telecommunications Program, including vendors, must conduct a fair and open competitive bidding process, consistent with all applicable requirements.</p> <p>(2) Vendors who intend to bid to provide supported services to a health care provider may not simultaneously help the health care provider choose a winning bid. Any vendor who submits a bid, and any individual or entity that has a financial interest in such a vendor, is prohibited from: preparing, signing or submitting an applicant's request for services or supporting documentation; serving as the point of contact on behalf of the applicant; being involved in setting bid evaluation criteria; or participating in the bid evaluation or vendor selection process (except in their role as potential vendors).</p> <p>(3) All potential bidders must have access to the same information and must be treated in the same manner.</p> <p>(4) An applicant may not have a relationship, financial interest, or ownership interest with a</p>

(v) The requested service or services will not be sold, resold or transferred in consideration of money or any other thing of value; and

(vi) If the service or services are being purchased as part of an aggregated purchase with other entities or individuals, the full details of any such arrangement, including the identities of all co-purchasers and the portion of the service or services being purchased by the health care provider.

(2) The Rural Health Care Division shall post each FCC Form 465 that it receives from an eligible health care provider on its website designated for this purpose.

(3) After posting an eligible health care providers FCC Form 465 on the Rural Health Care Corporation website, the Rural Health Care Division shall send confirmation of the posting to the entity requesting services. The health care provider shall wait at least 28 days from the date on which its FCC Form 465 is posted on the website before making commitments with the selected telecommunications carrier(s).

(4) After selecting a telecommunications carrier, the health care provider shall certify to the Rural Health Care Division that the provider is selecting the most cost-effective method of providing the requested service or services, where the most cost-effective method of providing a service is defined as the method that costs the least after consideration of the features, quality of transmission, reliability, and other factors that the health care provider deems relevant to choosing a method of providing the required health care services. The health care provider shall submit to the Administrator paper copies of the responses or bids received in response to the requested services.

service provider that would unfairly influence the outcome of a competition or furnish the service provider with inside information.

(5) An applicant may not turn over its responsibility for ensuring a fair and open competitive bidding process to a service provider or anyone working on behalf of a service provider.

(6) An employee or board member of the applicant may not serve on any board of any type of service provider that participates in the RHC Programs.

(7) An applicant may not accept or solicit, and a service provider may not offer or provide, any gift or other thing of value to employees or board members of the applicant, or anyone acting on the applicant's behalf.

(8) All applicants and vendors must comply with any applicable state, Tribal, or local competitive bidding requirements. The competitive bidding requirements in this section apply in addition to state, Tribal, and local competitive bidding requirements and are not intended to preempt such state, Tribal, or local requirements.

(c) *Cost-effective.* For purposes of the Telecommunications Program, "cost-effectiveness" is defined as the lowest-price service that meets the minimum requirements for the products and services that are essential to satisfy the communications needs of the applicant.

(d) *Bid evaluation criteria.* Applicants must develop evaluation criteria and demonstrate how the applicant will choose the most cost-effective bid before submitting a Request for Services. The applicant must specify on its bid evaluation worksheet and/or scoring matrix what its minimum requirements are for each of those criteria. The applicant must record on

(5) The confirmation from the Rural Health Care Division shall include the date after which the requester may sign a contract with its chosen telecommunications carrier(s).

the bid evaluation worksheet or matrix each service provider's proposed service levels for the established criteria. After reviewing the bid submissions and identifying the bids that satisfy the applicant's minimum requirements, the applicant must then select the service provider that costs the least.

(e) *Request for services.* Applicants must submit the following documents to the Administrator in order to initiate competitive bidding.

(1) Form 465, including certifications. The applicant must provide the Form 465 and the following certifications as part of the request for services:

(i) The requester is a public or nonprofit entity that falls within one of the seven categories set forth in the definition of health care provider, listed in §54.600(a).

(ii) The requester is physically located in a rural area.

(iii) The person signing the application is authorized to submit the application on behalf of the applicant and has examined the form and all attachments, and to the best of his or her knowledge, information, and belief, all statements contained therein are true.

(iv) The applicant has followed any applicable state, Tribal, or local procurement rules.

(v) All Telecommunications Program support will be used solely for purposes reasonably related to the provision of health care service or instruction that the health care provider is legally authorized to provide under the law of the state in which the services are provided and will not be sold, resold, or transferred in consideration for money or any other thing of value.

	<p>(vi) If the service or services are being purchased as part of an aggregated purchase with other entities or individuals, the full details of any such arrangement, including the identities of all co-purchasers and the portion of the service or services being purchased by the health care provider.</p> <p>(vii) The applicant satisfies all of the requirements under section 254 of the Act and applicable Commission rules.</p> <p>(viii) The applicant has reviewed all applicable requirements for the Telecommunications Program and will comply with those requirements.</p> <p>(2) <i>Bid evaluation criteria.</i> Requirements for bid evaluation criteria are described in paragraph (d) of this section and must be included with the applicant's Request for Services.</p> <p>(3) <i>Declaration of Assistance.</i> All applicants must submit a "Declaration of Assistance" with their Request for Services. In the Declaration of Assistance, applicants must identify each and every consultant, vendor, and other outside expert, whether paid or unpaid, who aided in the preparation of their applications. Applicants must also describe the nature of the relationship they have with the consultant, vendor, or other outside expert providing the assistance.</p> <p>(f) <i>Public posting by the Administrator.</i> The Administrator shall post the applicant's Form 465 and bid evaluation criteria on its website.</p> <p>(g) <i>28-day waiting period.</i> After posting the documents described in paragraph (f) of this section on its website, the Administrator shall send confirmation of the posting to the applicant. The applicant shall wait at least 28 days from the date on which its competitive</p>
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bidding documents are posted on the website before selecting and committing to a vendor.

(1) *Selection of the most "cost-effective" bid and contract negotiation.* Each applicant is required to certify to the Administrator that the selected bid is, to the best of the applicant's knowledge, the most cost-effective option available. Applicants are required to submit the documentation listed in § 54.610 to support their certifications.

(2) Applicants who plan to request evergreen status under this section must enter into a contract that identifies both parties, is signed and dated by the health care provider after the 28-day waiting period expires, and specifies the type, term, and cost of service.

(h) *Gift restrictions.* (1) Subject to paragraphs (h)(3) and (h)(4) of this section, an eligible health care provider or consortium that includes eligible health care providers and/or other eligible entities, may not directly or indirectly solicit or accept any gift, gratuity, favor, entertainment, loan, or any other thing of value from a service provider participating in or seeking to participate in the rural health care universal service program. No such service provider shall offer or provide any such gift, gratuity, favor, entertainment, loan, or other thing of value except as otherwise provided herein. Modest refreshments not offered as part of a meal, items with little intrinsic value intended solely for presentation, and items worth \$20 or less, including meals, may be offered or provided, and accepted by any individuals or entities subject to this rule, if the value of these items received by any individual does not exceed \$50 from any one service provider per funding year. The \$50 amount for any service provider shall be calculated as the aggregate value of all gifts provided during a funding year by the individuals specified in paragraph (h)(2)(ii) of this section.

	<p>(2) For purposes of this paragraph: (i) The terms “health care provider” or “consortium” shall include all individuals who are on the governing boards of such entities and all employees, officers, representatives, agents, consultants or independent contractors of such entities involved on behalf of such health care provider or consortium with the Rural Health Care Program, including individuals who prepare, approve, sign or submit RHC Program applications, or other forms related to the RHC Program, or who prepare bids, communicate or work with RHC Program service providers, consultants, or with USAC, as well as any staff of such entities responsible for monitoring compliance with the RHC Program; and</p> <p>(ii) The term “service provider” includes all individuals who are on the governing boards of such an entity (such as members of the board of directors), and all employees, officers, representatives, agents, or independent contractors of such entities.</p> <p>(3) The restrictions set forth in this paragraph shall not be applicable to the provision of any gift, gratuity, favor, entertainment, loan, or any other thing of value, to the extent given to a family member or a friend working for an eligible health care provider or consortium that includes eligible health care providers, provided that such transactions:</p> <p>(i) Are motivated solely by a personal relationship,</p> <p>(ii) Are not rooted in any service provider business activities or any other business relationship with any such eligible health care provider, and</p> <p>(iii) Are provided using only the donor’s personal funds that will not be reimbursed</p>
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	<p>through any employment or business relationship.</p> <p>(4) Any service provider may make charitable donations to an eligible health care provider or consortium that includes eligible health care providers in the support of its programs as long as such contributions are not directly or indirectly related to RHC Program procurement activities or decisions and are not given by service providers to circumvent competitive bidding and other RHC Program rules.</p> <p>(i) <i>Exemptions to competitive bidding requirements.</i> (1) <i>Government Master Service Agreement (MSA).</i> Eligible health care providers that seek support for services and equipment purchased from MSAs negotiated by federal, state, Tribal, or local government entities on behalf of such health care providers and others, if such MSAs were awarded pursuant to applicable federal, state, Tribal, or local competitive bidding requirements, are exempt from the competitive bidding requirements under this section.</p> <p>(2) <i>Master Service Agreements approved under the Pilot Program or Healthcare Connect Fund.</i> An eligible health care provider site may opt into an existing MSA approved under the Pilot Program or Healthcare Connect Fund and seek support for services and equipment purchased from the MSA without triggering the competitive bidding requirements under this section, if the MSA was developed and negotiated in response to an RFP that specifically solicited proposals that included a mechanism for adding additional sites to the MSA.</p> <p>(3) <i>Evergreen contracts.</i> (i) The Administrator may designate a multi-year contract as “evergreen,” which means that the service(s) covered by the contract need not be re-bid during the contract term.</p>
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	<p>(ii) A contract entered into by a health care provider or consortium as a result of competitive bidding may be designated as evergreen if it meets all of the following requirements:</p> <p>(A) Is signed by the individual health care provider or consortium lead entity;</p> <p>(B) Specifies the service type, bandwidth, and quantity;</p> <p>(C) Specifies the term of the contract;</p> <p>(D) Specifies the cost of services to be provided; and</p> <p>(E) Includes the physical location or other identifying information of the health care provider sites purchasing from the contract.</p> <p>(iii) Participants may exercise voluntary options to extend an evergreen contract without undergoing additional competitive bidding if:</p> <p>(A) The voluntary extension(s) is memorialized in the evergreen contract;</p> <p>(B) The decision to extend the contract occurs before the participant files its funding request for the funding year when the contract would otherwise expire; and</p> <p>(C) The voluntary extension(s) do not exceed five years in the aggregate.</p>
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EXHIBIT 12



Universal Service
Administrative Co.

Rural Health Care

[USAC Home](#) [Rural Health Care Program](#) [Healthcare Connect Fund Program](#) [Consortia](#) **[Consultants](#)**

CONSULTANTS

Applicants may use a consultant or other third party to file FCC forms and supporting documentation on their behalf through My Portal, the Rural Health Care (RHC) Program's application management system. Consultants are not permitted to be primary or secondary account holders in My Portal and may only be tertiary account holders created by the primary account holder.

Third Party Authorization

Applicants that use a third party to file FCC forms and supporting documentation must provide USAC with written authorization giving the third party authority to complete and submit forms on behalf of the consortium and assigning the consortium leader with responsibility for all liability for any errors, omissions, or misrepresentations that may be contained on the forms and documents. For more information about requirements, see the Third Party Authorization page.

Declaration of Assistance

Consultants who aid in the preparation of the FCC Form 460 or FCC Form 461, the Request for Services Form, including any of the associated documents submitted to USAC, must be identified in the "Declaration of Assistance" on Block 4 of the FCC Form 461. This declaration must list every consultant, service provider, and any other outside expert, whether paid or unpaid, who helped prepare any of the FCC forms or supporting documentation.

Prohibitions

Third parties or consultants who have an ownership interest, sales commission arrangement, or other financial stake with respect to a bidding service provider are prohibited from performing any of the functions below on behalf of the applicant:

- Preparing, signing, or submitting the FCC Form 461 or supporting documentation;
- Serving as consortium leaders or another point of contact on behalf of a health care provider;
- Preparing or assisting in the development of the competitive bidding evaluation criteria; or
- Participating in the bid evaluation or service provider selection process (except in their role as potential providers).

CERTIFICATE OF SERVICE

I, Russell D. Lukas, hereby certify that on September 4, 2018, I caused a copy of the foregoing OPPOSITION IN PART TO REQUEST FOR REVIEW to be served via first-class mail and email upon the following:

Matthew A. Brill
Elizabeth R. Park
Latham & Watkins LLP
555 Eleventh Street, N.W.
Suite 1000
Washington, D.C. 20004

Stephen J. Rosen
Colleen Boothby
Levine, Blaszak, Block & Boothby
2001 L Street, N.W., Suite 900
Washington, D.C. 20036

Universal Service Administrative Company
Rural Health Care
Attn: Letter of Appeal
700 12th Street, N.W., Suite 900
Washington, D.C. 20005

/s/ Russell D. Lukas

Russell D. Lukas