

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of)	
)	
Rural Health Care Program)	WC Docket No. 02-60
)	
Request for Review by Windstream)	Application Nos. and Funding
Communications, LLC of Decision by the)	Request Nos. listed in Exhibit A to
Universal Service Administrator)	Windstream Request for Review
)	
)	

REPLY IN SUPPORT OF REQUEST FOR REVIEW

Pursuant to sections 54.721(d) and 1.45(c) of the Commission’s rules,¹ Windstream Communications, LLC (“Windstream”) hereby submits this reply in response to the filing submitted by ABS Telecom, LLC (“ABS”) and its principal Gary Speck, which addresses Windstream’s Request for Review of the decisions of the Universal Service Administrative Company (“USAC”) denying funding under the Universal Service Rural Health Care Telecommunications Program (“Telecom Program”) and seeking recovery of funding from Windstream.

INTRODUCTION AND SUMMARY

On August 23, 2018, Windstream filed a Request for Review of USAC’s June 29, 2018 decisions denying Windstream’s appeals of USAC’s determination to deny funding under the Telecom Program for Funding Years 2012-2016 and USAC’s subsequent issuance of COMAD Letters for Funding Years 2012-2015.² In those decisions, USAC determined that there was a

¹ 47 C.F.R. §§ 54.721(d), 1.45(c).

² See Windstream Communications, LLC, Request for Review of Decision by the Universal Service Administrator, WC Docket No. 02-60, Request for Review (filed Aug. 23, 2018) (“Windstream Request”).

violation of the Commission’s “fair and open” competitive bidding rules because ABS provided consulting services to the applicants while acting as a channel partner for Windstream.

As detailed in Windstream’s Request for Review, Windstream did not violate any competitive bidding requirements under the Telecom Program. As an initial matter, there is no “fair an open” standard under the applicable Telecom Program rules. Although the Commission is considering revisions to those rules including possible adoption of such a standard, upholding USAC’s attempt to enforce such a non-existent standard in this case would violate due process. But even if such a standard were to apply to the Telecom Program and the bidding processes that occurred in this case, there is no basis for seeking recovery of funding from Windstream based on the dual role played by ABS and Mr. Speck. The Telecom Program rules regarding competitive bidding explicitly apply only to the health care provider applicant, and not to a service provider such as Windstream.³ Finally, upholding USAC’s determination that Windstream should be deprived of funding for the services it provided would result in an unconstitutional taking and would be arbitrary and capricious.

ABS filed a response to Windstream’s Request for Review largely agreeing with Windstream’s legal arguments and concluding that Windstream should not be held liable for any competitive bidding violations.⁴ ABS also asserts, however, that Windstream’s denial of knowledge of ABS’s dual role before February 2016 was contradicted by declarations submitted

³ See 47 C.F.R. § 54.603(a) (“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.”) (emphasis added).

⁴ See ABS Telecom, LLC and Gary Speck, Request for Review by Windstream Communications, LLC of Decision by the Universal Service Administrator, CC Docket No. 02-60, Opposition in Part to Request for Review (filed Sept. 4, 2018) (“ABS Response”).

by ABS and thus should be found to violate Section 1.17. ABS's attacks on Windstream's truthfulness—including in particular its challenges to the findings of the company's internal review of the relevant factual background—are baseless. Windstream's review process did not uncover any information about ABS's dual role before February 2016, notwithstanding ABS's unsupported claims to the contrary. Regardless, the question of what Windstream knew and when is a red herring. As ABS itself emphatically agrees, Windstream did not violate any competitive bidding rules, and there is no basis for USAC's decisions rescinding funding commitments.⁵

ARGUMENT

In its Response to Windstream's Request for Review, ABS wholeheartedly agrees that Windstream should not be held liable for violating any competitive bidding requirement or other rule, and in turn argues that USAC should not have rescinded the funding commitments at issue.⁶ Nonetheless, ABS asserts that Windstream's account of its factual findings is inaccurate and thus violated Section 1.17 of the Commission's rules.⁷ In particular, ABS contends that Windstream did not have a reasonable basis to state that its internal inquiry did not uncover evidence that Windstream management was aware of ABS's dual role prior to February 2016.

ABS's assertions are unsupported and incorrect. Windstream undertook a reasonable inquiry in good faith to ascertain the facts surrounding the channel partner agreement with ABS,⁸

⁵ ABS has also asked the Commission to review its allegations that Windstream violated Section 1.17 in ABS's Request for Review of USAC's denial of ABS and Mr. Speck's appeal. *See* ABS Telecom, LLC and Gary Speck, Request for Review of Decision of Universal Service Administrator, CC Docket No. 02-60, Request for Review (filed Aug. 29, 2018) ("ABS Request"). Notably, however, that Request for Review was not timely filed, and ABS has not requested a waiver or even offered any justification for the late filing.

⁶ *See* ABS Response at 4-12.

⁷ *See id.* at 12-16.

⁸ *See* Windstream Request, Declaration of Tim Loken ¶ 7.

and accurately conveyed its understanding of the relevant facts in its Requests for Review filed with USAC and the Commission based on the information available to the company. Notably, the employee who originated Windstream's channel partner relationship with ABS was no longer with the company when Windstream filed its first Request for Review with USAC. Windstream's internal review therefore was limited by the fact that its current employees did not have any interactions with ABS and Mr. 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.

ABS argues that Windstream's assertions must be inaccurate because Zachary Mungeer, who managed the ABS relationship between 2014 and 2016, was still employed by Windstream at the time of Windstream's internal inquiry.⁹ However, Mr. Mungeer had no involvement with the ABS relationship in 2011; accordingly, he had no direct knowledge of the circumstances regarding any arrangements with ABS at the inception of that channel partner relationship. Thus, there is no basis for ABS to refute Windstream's assertion that none of its employees who initiated the relationship with ABS and Mr. Speck were available at the time of Windstream's internal investigation. Windstream interviewed Mr. Mungeer during its internal investigation and did not uncover evidence that he knew of ABS's dual role prior to February 2016. Therefore, based on the understanding of its current personnel, including Tim Loken (who provided a sworn declaration), 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 and Mr. Speck's dual role until February 2016.

⁹ See ABS Response at 15.

ABS also relies on a declaration from former Windstream employee Charles Bates, who had managed the ABS relationship between 2011 and 2014. But his statements in no way undermine the accuracy of Windstream’s representations based on its fact-gathering from other individuals who remained employed by the company. Windstream had no knowledge of Mr. Bates’s contentions when it filed its initial Request for Review with USAC, and the company has since been unable to verify the truth of his assertions. In particular, while Mr. Bates asserts that he consulted with an unnamed attorney in Windstream’s legal department,¹⁰ his failure to identify the lawyer with whom he claims to have spoken calls into question the credibility of this claim, while also making it impossible for Windstream to investigate it further. In its Response, ABS simply repeats Mr. Bates’s claim about supposed legal consultation,¹¹ but again fails to provide any independent facts.

Ultimately, despite ABS’s transparent efforts to deflect attention from its own conduct, the question of when Windstream became aware of ABS’s dual role has no bearing on the merits of Windstream’s legal arguments regarding USAC’s determinations or its request for a waiver or other equitable relief. Consistent with Windstream’s arguments in its Request for Review, ABS’s filing—notwithstanding its side-show allegations about what Windstream’s sales personnel knew and when—confirms the absence of any record evidence to support the conclusion that ABS’s dual role conferred any improper benefit on Windstream. Accordingly, nothing in ABS’s filing detracts from Windstream’s argument that it would be improper to deny Telecom Program funding to or recover funds from Windstream, as ABS itself appears to agree.¹²

¹⁰ See Exhibit 3 to ABS Response, Declaration of Charles Bates ¶ 5.

¹¹ See ABS Response at 6; *id.* Exhibit 4, Declaration of Gary Speck ¶ 7.

¹² See ABS Response at 8 (“The Commission should hold that USAC cannot ‘withhold or claw back funding’ from Windstream.”) (quoting Windstream Request 16). *See also* Windstream

CONCLUSION

For the foregoing reasons, the Commission should disregard ABS's unsupported and inaccurate assertion that Windstream violated Section 1.17 of the Commission's rules. As ABS itself recognizes, the Commission should grant Windstream's Request for Review based on the legal defects underlying USAC's determinations below.

Respectfully submitted,

/s/

Matthew A. Brill
Elizabeth R. Park
LATHAM & WATKINS LLP
555 Eleventh Street, NW
Suite 1000
Washington, DC 20004

September 11, 2018

Request at 16 (“Basic principles of equity also militate against any effort to withhold or claw back funding based on the conduct of a third party.”).

CERTIFICATE OF SERVICE

I, Kayla Ernst, hereby certify that on September 11, 2018, I caused the foregoing to be served via first-class mail upon the following:

Universal Service Administrative Co.
Rural Health Care
Attn: Letter of Appeal
700 12th Street, NW, Suite 900
Washington, DC 20005
(also emailed to RHC-appeals@usac.org)

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

Counsel for ABS Telecom LLC and Gary Speck

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

Counsel for University of Texas Health Science Center

/s/
Kayla Ernst