

Windstream Second Carrier to Enter into Consent Decree Related to Rural Call Completion Performance – Agrees to Pay \$2.5 Million

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February 23, 2014

Although the Federal Communications Commission's [Rural Call Completion rules](#) have not yet become effective, the Enforcement Bureau recently concluded an investigation into the performance of Windstream in completing long-distance calls. The carrier reached a settlement with the Commission obligating it to make a voluntary contribution to the Treasury of \$2,500,000. The Enforcement Bureau's investigation, which commenced in November 2012, "ultimately focused" on the performance of the voice network owned and operated by PAETEC Holding Corporation prior to and after its 2011 acquisition by Windstream and potential violations of Sections 201(b) and 202(a) of the Communications Act, which proscribe practices of common carriers that are unjust or unreasonable or unjustly or unreasonably discriminatory. In addition to the significant monetary component, [the consent decree](#), adopted on Thursday, February 20, 2014, contains a three-year compliance plan commitment.

The basis for the investigation was the declaratory ruling of the FCC's Wireline Competition Bureau ("WCB") in February 2012, which found that "a carrier that knows or should know that it is providing degraded service to certain areas to fail to correct the problem or to fail to ensure that intermediate providers, least-cost routers, or other entities acting for or employed by the carrier are performing adequately" violates Section 201(b). The WCB explained that it is an unjust and unreasonable practice "if carriers continue to hand off calls to agents, intermediate providers, or others that a carrier knows are not completing a reasonable percentage of calls or are otherwise restricting traffic . . ." The WCB also clarified that "adopting or perpetuating routing practices that result in lower quality service to rural or high-cost localities than like service to urban or lower cost localities (including other lower cost rural areas) may . . . constitute unjust or unreasonable discrimination in practices, facilities, or services," violating Section 202(a).

The order and consent decree do not explain in detail what the investigation allegedly revealed, for example what Windstream's percentage of calls completed to rural LECs had been. But the settlement confirms that the monetary penalties for carriers failing to perform adequately may be substantial indeed. While the facts revealed are minimal, the terms of the consent decree strongly suggest that the Enforcement Bureau had evidence that Windstream's performance, or that of its downstream intermediate carriers, in completing calls to rural areas failed to satisfy whatever percentages the FCC deems sufficient. Among the noteworthy aspects of the compliance plan and consent decree generally:

- Windstream’s internal distribution of the compliance plan and annual and other revisions to covered employees may be by e-mail or an e-mail link to an intranet site, perhaps the first time we have seen this method of explicitly blessed.
- The consent decree makes it a violation, not only to fail to comply with the *Rural Call Completion* rules (once they take effect, which is true for all “Covered Providers” under the rules), but also to fail to report such non-compliance.
- Windstream agrees to work with the FCC and rural LECs to establish test points and uniform test criteria to evaluate rural call completion when there are indications of potential rural call completion problems from data or complaints.
- In addition to notifying intermediate carriers it uses when there are indications of call completion problems, and working toward resolutions, Windstream is obligated to cease using particular intermediate providers that have “sustained inadequate performance” “as reasonably determined by [Windstream],” provided other reasonable options are available to Windstream.
- The consent decree will be superseded by any conflicting subsequent Commission rule or order, although it is neither clear whether the Commission’s *Rural Call Completion* order and rules present any conflict – it seems unlikely – nor whether those rules and order, once they become effective, would be considered subsequent to the consent decree, in any event.

Some of the foregoing terms are noteworthy for their apparent vagueness – at least based on the face of the consent decree. In this regard, the Windstream consent decree is notably different than the consent decree which resolved the investigation into the rural call completion performance of [Level 3 Communications](#) and was adopted in March of 2013. The Level 3 consent decree included specific qualitative rural call quality commitments (relative to benchmark call completion rates) which, if not achieved, resulted in automatic additional voluntary contributions of \$1,000,000 (beyond the \$975,000 Level 3 agreed to pay for prior performance deficiencies). Windstream’s consent decree includes no comparable performance measures. Level 3 also agreed to a much more detailed set of commitments regarding intermediate provider monitoring and follow-up than are present in the Windstream decree. The two consent decrees, when compared, suggest that the Bureau is open to negotiating very circumstance-specific solutions when investigations reveal call completion problems are present.

Finally, while the new data collection, retention, and reporting rules adopted in the *Rural Call Completion* rules will not take effect until after Office of Management and Budget (“OMB”) review is complete, it is worth taking stock that those rules merely involve data collection (excluding the ring signaling integrity rules which already took effect). The new rules do not establish acceptable call completion percentages or prescribe any call completion requirements. The Windstream consent decree is a timely reminder that even before OMB review is complete and the new rules take effect – comments under the Paperwork Reduction Act review are only due on February 28, 2014 – carriers may still be liable if their performance, or the performance of the intermediate providers downstream, completing calls are considered deficient by the Commission pursuant to still evolving standards. Carriers should keep in mind that they must correct problems if they know or should know that they are providing degraded service to certain areas and must ensure that intermediate providers, least-cost routers, and other entities utilized by the carrier to complete calls are performing at adequate levels.