

State of Florida



Public Service Commission

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TALLAHASSEE, FLORIDA 32399-0850

-M-E-M-O-R-A-N-D-U-M-

DATE: June 3, 2021

TO: Office of Commission Clerk (Teitzman)

FROM: Office of Industry Development and Market Analysis (Yglesias de Ayala, Deas, ^{CH}
Fogleman)
Office of the General Counsel (Weisenfeld) ^{TL}

RE: Docket No. 20210070-TX – Petition for designation as eligible telecommunications carrier (ETC) in the State of Florida, by Windstream Communications, LLC.

AGENDA: 06/15/21 – Regular Agenda – Proposed Agency Action – Interested Persons May Participate

COMMISSIONERS ASSIGNED: All Commissioners

PREHEARING OFFICER: Fay

CRITICAL DATES: None

SPECIAL INSTRUCTIONS: None

Case Background

On April 13, 2021, Windstream Communications, LLC (Windstream or Company) filed a petition with the Florida Public Service Commission (Commission) seeking designation as an eligible telecommunications carrier (ETC) to receive Rural Digital Opportunity Fund (RDOF) support. Windstream is an interexchange telecommunications carrier that was granted an IXC Certificate by the Commission in 2005 under the name Alltel Holding Corporate Services, Inc.¹

¹ Memorandum filed February 9, 2006, in Docket No. 20050937-TI, *In re: Florida registration of Intrastate Interexchange Telecommunications Company (IXC), by Alltel Holding Corporate Services, Inc.* See also Memorandum filed August 8, 2006, in Docket No. 20060505-TP, *In Re: Acknowledgment of name change on IXC Registration No. TK045 from Alltel Holding Corporate Services, Inc. to Windstream Communications Inc., effective*

However in 2011, the Regulatory Reform Act was passed deregulating interexchange telecommunications carriers, thus removing the Commission's jurisdiction and invalidating Windstream's IXC certificate.

Windstream is a wholly owned subsidiary of Windstream Holdings II, LLC and Windstream Services, LLC. In addition, Windstream is an affiliate of incumbent local exchange carrier (ILEC), Windstream Florida, LLC, and several competitive local exchange carriers (CLEC) holding certificates in Florida. Windstream and its affiliates provide fiber-based VoIP and broadband service to residential and small business customers.

On December 7, 2020, Windstream Services, LLC was selected as one of the winning bidders of the Federal Communications Commission's (FCC) RDOF auction. Consistent with FCC rules, Windstream Services, LLC assigned part of its winning bid to Windstream. Windstream clarified in a supplemental filing that, although Windstream Services, LLC has affiliates that currently hold certificates in Florida, it was determined that Windstream would better meet the requirements of the federal RDOF program as it relates to the deployment of the network and customer support.² The Company further clarified that it will exclusively utilize a VoIP solution to provision voice-grade services.³

The RDOF is a form of high-cost support and is funded through the federal Universal Service Fund (USF). The FCC's RDOF initiative allocates up to \$20.4 billion through a two-phase competitive auction to help connect millions of unserved rural homes and small businesses to high-speed broadband. Phase I of the auction will provide up to \$16 billion to be used over a period of 10 years to service providers that commit to offer voice and broadband services to fixed locations in eligible unserved high-cost census blocks.⁴ In Florida, a total of 11 bidders were selected to receive approximately \$192 million of high-cost support in phase I.⁵ Windstream Services, LLC will receive \$40.7 million in phase I to be used in specified census blocks in Florida.⁶ Windstream Services, LLC assigned \$1.3 million to Windstream to provide services to 76 census block groups in Florida.

An ETC designation is a requirement for telecommunications carriers to receive USF support for the Lifeline and High-Cost programs. The Lifeline program enables low-income households to obtain and maintain basic telephone and broadband services and offers qualifying households a discount on their monthly bills. The High-Cost program helps carriers provide voice and broadband service in remote and underserved communities. Although the FCC did not require RDOF auction participants to be designated as an ETC to apply, the FCC did require winning bidders to obtain ETC designation within 180 days of being selected.

July 17, 2006. On May 14, 2015, Windstream Communications Inc. was converted to Windstream Communications LLC and the change was filed with the Florida Department of State, Division of Corporations.

² Response to staff's April 16, 2021, data request, DN 03694-2021, filed April 26, 2021, in Docket No. 20210070.

³ *Id.*

⁴ FCC, DA 20-1422, Public Notice, 904 Winning Bidders, <https://docs.fcc.gov/public/attachments/DA-20-1422A1.pdf>, accessed April 16, 2021

⁵ *Id.*, Attachment B, <https://docs.fcc.gov/public/attachments/DA-20-1422A3.pdf>, accessed April 16, 2021.

⁶ *Id.*, Attachment A, <https://docs.fcc.gov/public/attachments/DA-20-1422A2.pdf>, accessed April 16, 2021.

Windstream asserts that it meets all applicable federal requirements for designation as an ETC in Florida pursuant to 47 U.S.C. 214(e) and 47 C.F.R 54.201. In addition, Windstream acknowledges and asserts that if approved, it will comply with Sections 364.10 and 364.105, Florida Statutes (F.S.), and Rule 25-4.0665, Florida Administrative Code (F.A.C.), which govern Lifeline service and provide for a transitional discount for those customers no longer eligible for Lifeline.

47 U.S.C. 214(e)(2) authorizes state commissions to designate common carriers as an ETC as follows:

(2) Designation of eligible telecommunications carriers

A State commission shall upon its own motion or upon request designate a common carrier that meets the requirements of paragraph (1) as an eligible telecommunications carrier for a service area designated by the State commission. Upon request and consistent with the public interest, convenience, and necessity, the State commission may, in the case of an area served by a rural telephone company, and shall, in the case of all other areas, designate more than one common carrier as an eligible telecommunications carrier for a service area designated by the State commission, so long as each additional requesting carrier meets the requirements of paragraph (1). Before designating an additional eligible telecommunications carrier for an area served by a rural telephone company, the State commission shall find that the designation is in the public interest.

47 U.S.C. 214(e)(6) provides that the FCC will make such ETC designations in cases where a state commission lacks jurisdiction over the common carrier as follows:

(6) Common carriers not subject to State commission jurisdiction

In the case of a common carrier providing telephone exchange service and exchange access that is not subject to the jurisdiction of a State commission, the Commission shall upon request designate such a common carrier that meets the requirements of paragraph (1) as an eligible telecommunications carrier for a service area designated by the Commission consistent with applicable Federal and State law. Upon request and consistent with the public interest, convenience and necessity, the Commission may, with respect to an area served by a rural telephone company, and shall, in the case of all other areas, designate more than one common carrier as an eligible telecommunications carrier for a service area designated under this paragraph, so long as each additional requesting carrier meets the requirements of paragraph (1). Before designating an additional eligible telecommunications carrier for an area served by a rural telephone company, the Commission shall find that the designation is in the public interest.

The Commission's authority to designate a telecommunications company as an ETC is found at 364.10, F.S. However, pursuant to Section 364.011, F.S., the Commission does not have jurisdiction over intrastate interexchange telecommunications services, wireless/satellite, VoIP or broadband.

Discussion of Issues

Issue 1: Should the Commission grant Windstream Communications, LLC ETC status in Florida to Receive Rural Digital Opportunity Fund Auction (Auction 904) Support for Voice and Broadband Services?

Recommendation: No. Staff recommends that the Commission lacks jurisdiction to grant Windstream Communications, LLC ETC status in Florida. Staff further recommends that, as a provider of non-jurisdictional VoIP and broadband services, Windstream Communications, LLC should apply directly to the FCC for a Florida ETC designation. (Weisenfeld, Yglesias De Ayala, Deas, Fogleman)

Staff Analysis: Pursuant to 47 U.S.C. 214(e)(2), and 47 C.F.R 54.201(b), state commissions designate carriers as ETCs consistent with criteria set forth therein. Per 47 U.S.C. 214(e)(6), if a state lacks jurisdiction over a carrier, the FCC is to make such a designation. Section 364.011, F.S., identifies services that are exempt from Commission oversight. Included in these non-jurisdictional services are VoIP and broadband services. Until 2011, there was an exception in Section 364.011, F.S., which permitted Commission oversight of a service if “specifically authorized by federal law.” The legislature struck this exception by Section 3, Ch. 2011-36, Laws of Florida. Thus, the Commission no longer grants ETC designations to VoIP and broadband carriers.⁷ Therefore, because the VoIP and broadband services provided by Windstream are exempt from Commission oversight, staff recommends that the Commission lacks jurisdiction to grant Windstream ETC designation in Florida.

Moreover, by Section 364.10(1)(a), F.S., the legislature defined an ETC as “a telecommunications company, as defined by s. 364.02, which is designated as an eligible telecommunications carrier by the commission pursuant to 47 C.F.R. s. 54.201.” Section 364.02(13), F.S., provides that a “telecommunications company” is an entity offering “two-way telecommunications service to the public for hire within [Florida] by the use of a telecommunications facility.” Thus, whether a carrier is a certificated telecommunications company offering a telecommunications service is also a threshold question for whether the Commission has jurisdiction to grant an ETC designation.⁸ As explained above, Windstream’s IXC certificate was invalidated after the Commission’s authority over interexchange telecommunications carriers was eliminated. Accordingly, staff recommends that Windstream’s lack of a certificate of authority to provide telecommunications service in Florida is another reason the Commission lacks jurisdiction to grant the Company ETC status.

In sum, staff recommends that the Commission lacks jurisdiction to grant Windstream Communications, LLC ETC status in Florida. Staff further recommends that, as a provider of

⁷ The Commission only has the powers, duties, and authority that have been conferred expressly or impliedly to it by the Florida Legislature through statute. *City of Cape Coral v. GAC Utilities, Inc., of Florida*, 281 So. 2d 493, 495-96 (Fla. 1973). Further, the Commission is barred from exercising a power when there is any reasonable doubt as to the lawful existence of that power. *See id.*

⁸ In this context, 364.02(14), F.S., provides that a “telecommunications facility” includes real estate, easements, apparatus, property, and routes used and operated to provide two-way telecommunications service to the public for hire within [Florida].” “‘Service’ is to be construed in its broadest and most inclusive sense;” however, the term “does not include broadband service or voice-over-Internet protocol service for purposes of regulation.” *Id. at* (12).

non-jurisdictional VoIP and broadband services, Windstream Communications, LLC should apply directly to the FCC for a Florida ETC designation.

Issue 2: Should this docket be closed?

Recommendation: Yes. If no person whose substantial interests are affected by the proposed agency action files a protest within 21 days of the issuance of the Proposed Agency Action Order, this docket should be closed upon the issuance of a consummating order. (Weisenfeld)

Staff Analysis: At the conclusion of the protest period, if no protest is filed, this docket should be closed upon the issuance of a consummating order.