

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

In the Matter of)	File No.: EB-10-IH-2091
)	
Windstream Iowa Communications, Inc.)	NAL/Acct. No.: 201232080011
)	
Apparent Liability for Forfeiture)	FRN: 0019527837

NOTICE OF APPARENT LIABILITY FOR FORFEITURE

Adopted: December 13, 2011

Released: December 14, 2011

By the Chief, Enforcement Bureau:

I. INTRODUCTION

1. In this *Notice of Apparent Liability for Forfeiture* (“NAL”), we find that Windstream Iowa Communications, Inc. (“Windstream Iowa”) apparently willfully violated Section 214(a) of the Communications Act of 1934, as amended (the “Act”),¹ and Sections 63.03 and 63.04 of the Commission’s rules,² by failing to obtain Commission approval prior to obtaining control of a domestic Section 214 authorization held by Direct Communications, LLC (“Direct”). Based on our review of the facts and circumstances surrounding this matter, and for the reasons discussed below, we find that Windstream Iowa is apparently liable for a total forfeiture of \$8,000.

II. BACKGROUND

2. Section 214(a) of the Act prohibits any carrier from constructing, extending, acquiring or operating any line, and from engaging in transmission through any such line, “unless and until there shall first have been obtained from the Commission a certificate that the present or future public convenience and necessity” require, or will require, the construction, extension, acquisition, or operation of the line.³ Sections 63.03 and 63.04 of the rules require Commission approval before a transfer of control or assignment of a domestic Section 214 authorization is consummated.⁴

3. Iowa Telecommunications Services, Inc. (“Iowa Telecom”) is an Iowa-based company that operates as a local exchange services provider. On July 1, 2009, Iowa Telecom acquired substantially all of the assets of Sherburne Tele Systems, Inc. (“Sherburne”) and its subsidiaries, including Sherburne’s interest in Direct, a telecommunications service provider offering fiber optic

¹ 47 U.S.C. 214(a).

² 47 C.F.R. §§ 63.03, 63.04.

³ *Supra* note 1.

⁴ *Supra* note 2.

transport services.⁵ Before the parties consummated their transaction on July 1, 2009, Iowa Telecom apparently sought Commission approval to transfer most of Sherburne's Commission authorizations to Iowa Telecom, but Iowa Telecom did not seek Commission approval for the transfer of Direct's domestic Section 214 authority to Iowa Telecom.⁶

4. Iowa Telecom did not file an application with the Commission's Wireline Competition Bureau ("WCB") for approval to transfer control of Direct's domestic Section 214 authorization to Iowa Telecom until December 14, 2009, more than six months after it had consummated its transaction with Sherburne.⁷ WCB granted Iowa Telecom's application on January 22, 2010.⁸ On April 14, 2010, the Enforcement Bureau issued a letter of inquiry ("LOI") to Iowa Telecom, directing the company to respond to inquiries concerning the transfer of Direct's domestic Section 214 authorization to Iowa Telecom.⁹ Iowa Telecom responded to the LOI on April 29, 2010.¹⁰ On June 1, 2010, Iowa Telecom merged with and into Buffalo Merger Sub, Inc. ("Buffalo"), a subsidiary of Windstream Corporation ("Windstream"). After this merger, Buffalo became Windstream Iowa.¹¹

III. DISCUSSION

5. Under Section 503(b)(1) of the Act, "[a]ny person who is determined by the Commission . . . to have . . . willfully or repeatedly failed to comply with any of the provisions of this Act or of any rule, regulation, or order issued by the Commission under this Act . . . shall be liable to the United States for a forfeiture penalty."¹² Section 312(f)(1) of the Act defines "willful" as the "conscious and deliberate commission or omission of [any] act, irrespective of any intent to violate any provision of this Act or any rule or regulation by the Commission authorized by this Act."¹³ The legislative history to Section 312(f)(1) of the Act clarifies that this definition of "willful" applies to both Sections 312 and 503(b) of the Act,¹⁴ and the Commission has so interpreted the term in the Section 503(b) context.¹⁵ To impose a

⁵ See Letter from Gregory Vogt, Counsel to Iowa Telecommunications Services, Inc., to Trent Harkrader, Deputy Chief, Investigations & Hearings Division, Enforcement Bureau, Federal Communications Commission, Exhibit 1 (Apr. 29, 2010) ("LOI Response").

⁶ See *id.* Iowa Telecom has admitted that it should have obtained Commission authority to transfer control of Sherburne's interest in Direct before July 1, 2009. *Id.*

⁷ *Domestic Section 214 Application Filed for the Acquisition of Assets of Direct Communications, LLC by Iowa Telecommunications Services, Inc.*, Public Notice, 24 FCC Rcd 14636 (Wireline Competition Bureau 2010).

⁸ *Notice of Domestic Section 214 Authorizations Granted*, Public Notice, 25 FCC Rcd 863 (Wireline Competition Bureau 2010).

⁹ Letter from Trent Harkrader, Deputy Chief, Investigations & Hearings Division, Enforcement Bureau, Federal Communications Commission, to Gregory Vogt, Counsel to Iowa Telecommunications Services, Inc. (Apr. 14, 2010).

¹⁰ See *supra* note 5.

¹¹ See *Domestic Section 214 Application Filed for the Transfer of Control of Iowa Telecommunications Services, Inc. to Windstream Corporation*, Public Notice, 25 FCC Rcd 444, 445 (Wireline Competition Bureau 2010); see also Electronic mail message from Malena F. Barzilai, Regulatory Counsel and Director, Federal Government Affairs, Windstream Communications, to David Janas, Special Counsel, Investigations & Hearings Division, Enforcement Bureau, Federal Communications Commission (Nov. 16, 2011).

¹² 47 U.S.C. § 503(b)(1); see also 47 C.F.R. § 1.80(a)(1).

¹³ 47 U.S.C. § 312(f)(1).

¹⁴ H.R. Rep. No. 97-765, 97th Cong. 2d Sess. 51 (1982).

forfeiture penalty, the Commission must issue a notice of apparent liability, and the person against whom the notice has been issued must have an opportunity to show, in writing, why no such forfeiture penalty should be imposed.¹⁶ The Commission will then issue a forfeiture if it finds, based on the evidence, that the person has violated the Act, a rule, or a Commission order.¹⁷

A. Apparent Violation of Section 214

6. We conclude that it is apparent that Windstream Iowa's predecessor, Iowa Telecom, willfully violated Section 214 of the Act and Sections 63.03 and 63.04 of the rules because it failed to obtain Commission approval before consummating a substantial transfer of control of a domestic Section 214 authorization.¹⁸ Iowa Telecom did not file an application for Commission approval until December 14, 2009, more than 6 months after its July 1, 2009 transfer of control.

B. Proposed Forfeiture

7. In determining the amount of a forfeiture penalty, Section 503(b)(2)(E) of the Act and Section 1.80(a)(4) of the rules direct the Commission to take into account "the nature, circumstances, extent, and gravity of the violation . . . and the degree of culpability, any history of prior offenses, ability to pay, and such other matters as justice may require."¹⁹ The Commission's Forfeiture Policy Statement and implementing rules prescribe a base forfeiture of \$8,000 for each separate unauthorized substantial transfer of control.²⁰ Based on the facts and circumstances presented, we conclude that a proposed forfeiture of \$8,000 against Windstream Iowa is warranted.

IV. ORDERING CLAUSES

8. **ACCORDINGLY, IT IS ORDERED** that, pursuant to Section 503(b) of the Act²¹ and Sections 0.111, 0.311, 0.314 and 1.80 of the rules,²² Windstream Iowa Communications, Inc. is hereby **NOTIFIED** of its **APPARENT LIABILITY FOR A FORFEITURE** in the amount of \$8,000 for apparently willfully or repeatedly violating Section 214 of the Act and Sections 63.03 and 63.04 of the rules.²³

9. **IT IS FURTHER ORDERED** that, pursuant to Section 1.80 of the rules, within thirty (30) calendar days of the release date of this Notice of Apparent Liability for Forfeiture, Windstream Iowa Communications, Inc. **SHALL PAY** the full amount of the proposed forfeiture or **SHALL FILE** a written statement seeking reduction or cancellation of the proposed forfeiture.

¹⁵ See, e.g., *Southern California Broadcasting Co.*, Memorandum Opinion and Order, 6 FCC Rcd. 4387, 4388, ¶ 5 (1991) ("*Southern California Broadcasting*").

¹⁶ 47 U.S.C. § 503(b); 47 C.F.R. § 1.80(f).

¹⁷ See, e.g., *SBC Communications, Inc.*, Forfeiture Order, 17 FCC Rcd. 7589, 7591, ¶ 4 (2002).

¹⁸ See 47 U.S.C. 214(a); see also 47 C.F.R. §§ 63.03, 63.04.

¹⁹ 47 U.S.C. § 503(b)(2)(E).

²⁰ See 47 C.F.R. § 1.80; *Forfeiture Policy Statement*, 12 FCC Rcd. 17087, 17113 (1997).

²¹ 47 U.S.C. § 503(b).

²² 47 C.F.R. §§ 0.111, 0.311, 0.314, 1.80.

²³ 47 U.S.C. § 214; 47 C.F.R. §§ 63.03, 63.04.

10. Payment of the forfeiture must be made by check or similar instrument, payable to the order of the Federal Communications Commission. The payment must include the NAL/Acct. No. and FRN referenced above. Payment by check or money order may be mailed to Federal Communications Commission, P.O. Box 979088, St. Louis, MO 63197-0000. Payment by overnight mail may be sent to U.S. Bank – Government Lockbox #979088, SL-MO-C2-GL, 1005 Convention Plaza, St. Louis, MO 63101. Payments by wire transfer may be made to ABA Number 021030004, receiving bank Federal Reserve Bank of New York, and account number 2700001. For payment by credit card, an FCC Form 159 (Remittance Advice) must be submitted. When completing the FCC Form 159, enter the NAL/Account number in block 23A (call sign/other ID), and enter the letters “FORF” in block number 24A (payment type code). ATMS will also send electronic notification within forty-eight (48) hours of the date said payment is made to Terry Cavanaugh at Terry.Cavanaugh@fcc.gov, Pamela Kane at Pamela.Kane@fcc.gov, and David Janas at David.Janas@fcc.gov.

11. The written statement seeking reduction or cancellation of the proposed forfeitures, if any, must include a detailed factual statement supported by appropriate documentation and affidavits pursuant to Sections 1.80(f)(3) and 1.16 of the Commission’s rules.²⁴ The written statement must be mailed to Theresa Z. Cavanaugh, Acting Chief, Investigations and Hearings Division, Enforcement Bureau, Federal Communications Commission, 445 12th Street, S.W., Room 4-C330, Washington, D.C. 20554 and must include the NAL/Acct. No. referenced above. The written statement should also be emailed to Terry Cavanaugh at Terry.Cavanaugh@fcc.gov, Pamela Kane at Pamela.Kane@fcc.gov, and David Janas at David.Janas@fcc.gov.

12. The Commission will not consider reducing or canceling a forfeiture in response to a claim of inability to pay unless the petitioner submits: (1) federal tax returns for the most recent three-year period; (2) financial statements prepared according to generally accepted accounting practices (GAAP); or (3) some other reliable and objective documentation that accurately reflects the petitioner’s current financial status. Any claim of inability to pay must specifically identify the basis for the claim by reference to the financial documentation submitted.

13. Requests for payment of the full amount of this Notice of Apparent Liability for Forfeiture under an installment plan should be sent to: Chief Financial Officer – Financial Operations, Federal Communications Commission, 445 12th Street, S.W., Room 1-A625, Washington, D.C. 20554.²⁵ For answers to questions regarding payment procedures, contact the Financial Operations Group Help Desk at 1-877-480-3201 or Email: ARINQUIRIES@fcc.gov.

²⁴ See 47 C.F.R. §§ 1.80(f)(3), 1.16.

²⁵ See 47 C.F.R. § 1.1914.

14. **IT IS FURTHER ORDERED** that a copy of this *Notice of Apparent Liability for Forfeiture* shall be sent by certified mail, return receipt requested, to Malena F. Barzilai, Regulatory Counsel and Director, Federal Government Affairs, Windstream Communications, 1101 17th Street, N.W., Suite 802, Washington, D.C. 20036.

FEDERAL COMMUNICATIONS COMMISSION

P. Michele Ellison
Chief, Enforcement Bureau