

ALERT

FCC Releases Order to Further Implement the Improving Rural Call Quality and Reliability Act

March 19, 2019

On March 15, 2019, the Federal Communications Commission released its Fourth Report and Order in the Rural Call Completion proceeding (*Fourth RCC Order*).^[1] The *Fourth RCC Order* builds on the Commission's prior efforts to address call completion issues and implements the Improving Rural Call Quality and Reliability Act of 2017 (RCC Act).^[2]

A. Service Quality Standards for Intermediate Providers

The RCC Act directs the Commission to establish an intermediate provider registry and stipulates that (1) certain intermediate providers must register with the Commission, and (2) covered providers may only use registered intermediate providers to transmit covered voice communications. In addition, the RCC Act directs the Commission to establish service quality standards for the transmission of covered voice communications by intermediate providers and requires intermediate providers to comply with such standards.

In the *Third RCC Order*, the Commission began implementation of the RCC Act by mandating registration of all intermediate providers and requiring that covered providers use only registered intermediate providers.^[3] The *Third RCC Order* also implemented the RCC Act's prohibition against the use of unregistered intermediate providers by any covered provider in the path of a given call.

In the *Fourth RCC Order*, the Commission adopted service quality standards for intermediate providers, which are summarized below. The Commission embraced a flexible regulatory approach to

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intermediate provider service quality standards, declining to require compliance with the three best practices identified by ATIS. (§§ 17-18). However, to encourage providers to adopt these practices, as is true of the Commission's monitoring rule for covered providers, the Commission will treat compliance with the ATIS best practices as a safe harbor demonstrating compliance with its service quality standards for intermediate providers. The Commission also will take the ATIS best practices into account when evaluating whether an intermediate provider has established an effective monitoring regime for evaluating its performance in delivering calls to rural areas. (§ 19).

1. Duty to Complete Calls

The Commission adopts new section 64.2119 which requires that intermediate providers take steps reasonably calculated to ensure that all covered voice communications that traverse their networks are delivered to their destination. If an intermediate provider knows, or should know, that calls are not being completed to certain areas, the intermediate provider may be in violation of this general duty if it engages in acts or omissions that allow or effectively allow these conditions to persist. (§ 20).

Under this requirement, intermediate providers must promptly resolve any anomalies or problems that arise preventing call completion and take action to ensure that such issues do not recur. If an intermediate provider determines that responsibility for a call completion problem lies with a party other than the provider itself or any of its downstream providers, the intermediate provider must use commercially reasonable efforts to alert that party to the anomaly or problem. The *Fourth RCC Order* emphasizes that "willful ignorance will not excuse a failure by an intermediate provider to investigate evidence of poor performance." Evidence of poor performance includes, among other indicators: (a) persistent low answer or completion rates; (b) unexplained anomalies in performance reflected in the metrics used by the intermediate provider; or (c) repeated complaints to the Commission, state regulatory agencies, or intermediate providers by customers, rural incumbent LECs and their customers, competitive LECs, and others. (§ 21).

The Commission's rule does not dictate how intermediate providers must route their traffic, nor does the general duty to deliver covered voice communications impose strict liability upon intermediate providers who fail to complete calls. Because the Commission's "rules for intermediate providers focus on addressing persistent call completion issues; thus, strict liability under our service quality rules for isolated call failures is not contemplated." (§ 22).

The Commission emphasized that the RCC Act is not limited to rural areas. Thus, the general duty to complete calls applies "to all covered voice communications, regardless of their destination." (§ 23).

2. Duty to Monitor the Performance of Any Directly Contracted Intermediate Providers

Under new section 64.2119, for each intermediate provider with which it contracts, an intermediate provider must: (a) monitor the intermediate provider's performance in the completion of call attempts to rural telephone companies; and (b) based on the results of such monitoring, take steps that are reasonably calculated to correct any identified performance problem with the intermediate provider, including removing that provider for sustained poor performance. (§ 23).

The rural call completion performance monitoring obligation entails both prospective evaluation to prevent problems and retrospective investigation of any problems that arise. Prospective monitoring includes regular observation of intermediate provider performance and call routing decision-making; periodic evaluation to determine whether to make changes to improve rural call completion performance; and actions to promote improved call completion performance where warranted. (§ 24).

Retrospective monitoring requires intermediate providers to take steps reasonably calculated to correct any identified performance problems. If intermediate providers detect persistent problems routing covered voice traffic to rural areas, they are required to develop a solution that is reasonably calculated to be effective. They must also remove a contracted intermediate provider from a route after sustained inadequate performance, except in situations where an intermediate provider can demonstrate that no alternative routes exist. Intermediate providers that do not effectively correct problems with delivery of covered voice communications to rural areas may be subject to enforcement action for violations of the service quality standards. (§ 26).

3. Registration of Subsequent Intermediate Providers

Under new section 64.2119, intermediate providers are required to ensure that any additional intermediate providers to which they hand off calls are registered with the Commission pursuant to section 64.2115 of the Commission's rules. (§ 27). The Commission stated that it expects the burdens associated with this requirement to be minimal because information concerning the registration status of intermediate providers will be readily available on the Commission's website. (§ 28).

B. Exception to Service Quality Standards for Safe Harbor Covered Providers

Consistent with the RCC Act, which provides that the service quality standards established by the Commission "shall not apply to a covered provider" that has certified as a safe harbor provider and continues to maintain eligibility for the safe harbor, the Commission adopted an exception to the service quality standards described above for intermediate providers that qualify for the covered provider safe harbor established in new section 64.2109 of the Commission's rules. (§ 34).

To qualify for the exemption from the intermediate provider service quality standards pursuant to new section 64.2109, covered providers must satisfy three requirements:

1. The covered provider restricts by contract any intermediate provider to which a call is directed from permitting more than one additional intermediate provider in the call path before the call reaches the terminating provider or terminating tandem;
2. Any nondisclosure agreement with an intermediate provider permits the covered provider to reveal the identity of the intermediate provider and any additional intermediate provider to the Commission and to the rural incumbent LEC whose incoming long-distance calls are affected by the intermediate provider's performance; and
3. The covered provider has a process in place to monitor the performance of its intermediate providers. (§ 35).

C. Enforcement of Intermediate Provider Requirements

The *Fourth RCC Order* sets forth procedures to enforce the intermediate provider requirements. First, the Commission may exercise its forfeiture authority against intermediate providers that fail to comply with the service quality standards, and it may do so without first issuing a citation. In this regard, the Commission stated that it may impose penalties for both single infractions and patterns of non-compliance or misconduct. (¶ 38).

Second, the Commission may seek to remove an intermediate provider from the registry. Except in cases of willfulness or where public health, interest, or safety requires otherwise, deregistration may occur after the intermediate provider has been given written notice of the facts or conduct at issue and an opportunity to demonstrate or achieve compliance with the service quality standards. Such notice will take the form of a publicly issued order to show cause. Intermediate providers that do not present a response with written evidence of their compliance with the requirements identified in the notice or a detailed plan on how they intend to achieve compliance within thirty days will be removed from the registry. Deregistration orders will be subject to judicial review under Section 402(a) of the Communications Act. (¶ 39).

Lastly, a covered provider that becomes aware that an intermediate provider it uses is violating the service quality standards may also be subject to enforcement action, even if the intermediate provider is properly registered. The Commission stated that because covered providers must know or be capable of knowing the identity of all intermediate providers in the path of a given call, monitor their performance, and take steps to correct performance problems, when a provider learns that its intermediate provider is violating service quality standards, it is responsible for removing that provider from all affected call paths until the provider demonstrates compliance. (¶ 40).

D. One-Year Sunset of Recording and Retention Rules

The Commission will sunset the rural call completion data recording and retention requirements found in sections 64.2103 (titled “Retention of call attempt records”) and 64.2107 (titled “Reduced recording and retention requirements for qualifying providers under the Safe Harbor”), which were adopted in 2013.[4] The Commission concluded that the few, if any, benefits the call data offers do not outweigh the burden presented by having covered providers collect and retain data that is not useful in monitoring or remedying call completion issues. (¶¶ 41, 43).

The data recording and retention requirements will sunset one year after the service quality standards in new section 64.2119 are in effect. (¶ 49).

E. Other Issues

1. No Additional Rules to Prevent Ring Signaling Manipulation

The Commission declined to adopt additional rules to prevent intermediate providers from manipulating signaling information for calls destined for rural areas. The *Fourth RCC Order* notes that section 64.1601(a)(2) of the rules already requires intermediate providers to pass and return unaltered signaling information and, therefore, additional rules are unnecessary. (¶ 29).

2. No Limitation on the Number of Intermediate Providers

The Commission declined to require intermediate providers to limit the number of subsequent intermediate providers in the call chain. The Commission agreed with some commenters who argued that the number of intermediate providers is not an appropriate proxy to identify specific intermediate providers or routing practices that interfere with rural call completion. However, the Commission stated that the new service quality standards discussed above will encourage intermediate providers to limit other providers in the chain. (¶ 30).

3. Numeric Performance Thresholds

The Commission declined to require intermediate providers to meet or exceed one or more numeric rural call completion performance targets. However, the Commission stated that it expects intermediate providers to monitor their networks and downstream providers with sufficient specificity to adequately evaluate their performance. In this regard, the Commission stated that “a reasonable self-monitoring process—consistent with monitoring processes for covered providers and contemplated by the Senate Commerce Committee Report[5]—will sufficiently monitor downstream providers and allow correction.” (¶ 31).

4. Modification of Rules Adopted in the *Second RCC Order*

The Commission declined to make any modifications to the rules adopted in the April 2018 *Second RCC Order*.^[6] In the *Second RCC Order*, the Commission adopted a requirement codified in section 64.2111 of the rules which requires that covered providers monitor the performance of the intermediate providers to which they hand off calls, and, based on the results of such monitoring, take steps reasonably calculated to correct any identified performance problems with downstream intermediate providers.^[7] The Commission stated in the *Second RCC Order* that, under the monitoring rule, “a covered provider is accountable for monitoring the performance of any intermediate provider with which it contracts, including that intermediate provider’s decision as to whether calls may be handed off to additional downstream intermediate providers . . . and whether it has taken sufficient steps to ensure that calls will be completed post-handoff.”^[8]

Several parties sought reconsideration of various aspects of the rules adopted in the *Second RCC Order*. In rejecting these petitions, the Commission reaffirmed its findings in the *Second RCC Order* that the monitoring rule is necessary to address ongoing rural call completion issues and is supported by the record in the proceeding and the regulatory regime established by Congress in the RCC Act. (¶¶ 33, 55-64).

[1] *Rural Call Completion*, Fourth Report and Order, FCC 19-23 (Mar. 15, 2019).

[2] Improving Rural Call Quality and Reliability Act of 2017, Pub. L. No. 115-129, 132 Stat 329 (2018).

[3] *Rural Call Completion*, Third Report and Order, 33 FCC Rcd 8400 (2018).

[4] *Rural Call Completion*, Report and Order and Further Notice of Proposed Rulemaking, 28 FCC Rcd 16154 (2013).

[5] The “Senate Commerce Committee Report” refers to the report accompanying the RCC Act. See S. Rep. No. 115-6, at 6 (2017), <https://www.congress.gov/115/crpt/srpt6/CRPT-115srpt6.pdf>.

[6] *Rural Call Completion*, Second Report and Order, 33 FCC Rcd 4199 (2018) (Second RCC Order).

[7] *Second RCC Order*, 33 FCC Rcd at 4214-16, ¶ 34.

[8] *Id.*