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**UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK**

| | | |
|---|---|-------------------------|
| In re: |) | Chapter 11 |
| |) | |
| WINDSTREAM HOLDINGS, INC., <i>et al.</i> , ¹ |) | Case No. 19-22312 (RDD) |
| |) | |
| Debtors |) | (Jointly Administered) |
| |) | |

**THE STATE OF FLORIDA’S MOTION FOR ENTRY OF AN ORDER FINDING THAT:
(1) THE STATE’S REQUEST TO INTERVENE IN THE STATE COURT LITIGATION
DOES NOT VIOLATE THE AUTOMATIC STAY; AND, (2) THE AUTOMATIC STAY
WILL NOT APPLY TO THE STATE COURT LITIGATION ONCE THE STATE
COURT ALLOWS SUCH INTERVENTION**

The State of Florida, by and through the Department of Legal Affairs, Office of the Attorney General (the “Attorney General”), hereby respectfully requests that the Court enter an Order finding that: (1) the State’s request to intervene in the Florida False Claims Act litigation styled *State of Florida ex rel. Phone Recovery Services, LLC v. Windstream Communications, LLC, Windstream Florida, LLC, Paetec Communications, LLC, US LEC of Florida, LLC, US LEC Communications, LLC, and Network Telephone LLC*, No. 2016-CA-002103 (the “State Court

¹ The last four digits of Debtor Windstream Holdings, Inc.’s tax identification number are 7717. Due to the large number of Debtors in these chapter 11 cases, for which joint administration has been granted, a complete list of the debtor entities and the last four digits of their federal tax identification numbers is not provided herein. A complete list of such information may be obtained on the website of the Debtors’ proposed claims and noticing agent at <http://www.kccllc.net/windstream>. The location of the Debtors’ service address for purposes of these chapter 11 cases is: 4001 North Rodney Parham Road, Little Rock, Arkansas 72212.



Litigation”) does not violate the automatic stay; and, (2) the automatic stay will not apply to the State Court Litigation after the state court allows such intervention. In support thereof, the Attorney General states as follows:

A. Background and Procedural Posture

Phone Recovery Systems, LLC (“PRS” or “Relator”) filed the State Court Litigation pursuant to the Florida False Claims Act, § 68.081, Fla. Stat. (2016), *et seq.*, on September 20, 2016. The Complaint in the State Court Litigation alleges that the Debtors billed fewer than the required number of 911 fees to wireline business telephone customers in Florida in violation of Florida’s 911 statute, § 365.171, *et seq.*, Fla. Stat. (2016). It further alleges that the Debtors submitted false or fraudulent Florida Emergency Communications Number E911 System Remittance Reports to the State of Florida each month. Per the Complaint, the remittance reports submitted to the State of Florida by the Debtors concealed their practice of under-billing and under-remitting 911 fees, causing the State to lose critical funding for 911 emergency services.

The Complaint in the State Court Litigation asserts a claim under the Florida False Claims Act based upon the allegedly false 911 Remittance Reports and the practice of invoicing customers fewer 911 fees than required by law. The Complaint seeks injunctive relief to stop the unlawful practice along with monetary relief under the Florida False Claims Act. A copy of the Complaint from the State Court Litigation is attached hereto as Exhibit “1.”

The Attorney General filed a Notice of Election Not to Proceed and Request for Continued Service of Pleadings and Papers on September 21, 2016. That pleading noted “the State of Florida remains the real party in interest and the Department reserves its right to, *inter alia*, seek to intervene and take over the action at a later date if appropriate.” *See Barati v. State*, 198 So. 3d 69,

81 (Fla. 1st DCA 2016) (“Under the Florida FCA, the Attorney General is [always] the real party in interest ...”).

On March 30, 2017, the Florida court consolidated the State Court Litigation with four other similar Florida False Claims Act cases brought by PRS. Five months later, after substantial briefing and a lengthy hearing, the Florida court denied the motion to dismiss filed by the Debtors and several other telephone service provider defendants.

On May 17, 2018, the Florida court stayed the State Court Litigation, opting to await a declaration from the Federal Communications Commission in a proceeding referred to the Commission by the United States District Court for the Northern District of Alabama (the “FCC Stay Order”). On March 11, 2019, Debtors filed a Suggestion of Bankruptcy and Notice of Automatic Stay in the State Court Litigation.

On April 30, 2019, Debtors filed a Motion to Enforce the Automatic Stay (“Debtors’ Motion”) in this Court seeking to enforce an automatic stay with respect to the actions of PRS in the State Court Litigation. (Doc. 447). This Court granted Debtors’ Motion after a hearing on June 17, 2019. (Doc. 696). The subsequent order regarding the stay and PRS made no mention of the State.

On June 7, 2019, one week after the state court stay had expired as to the Debtors, the Attorney General filed a Motion to Intervene and For Entry of An Order Determining That There Is No Applicable Bankruptcy Stay (“the Motion to Intervene”). A copy of the Motion to Intervene is attached hereto as Exhibit “2.” The motion explains that the State of Florida seeks to take over the State Court Litigation and continue its own claim under the Florida False Claims Act against the Debtors.

While the Attorney General continues to believe that the Florida state court has concurrent jurisdiction to determine the applicability of an automatic stay under § 362(a), *see In re Siskin*, 258 B.R. 554, 563 (Bankr. E.D.N.Y. 2001), she has decided to file this motion after reviewing the Court's comments from the June 17, 2019 hearing. By this motion, the Attorney General seeks a determination: (1) that her intervention request does not violate the automatic stay; and, (2) the automatic stay will not apply to the State Court Litigation against the Debtors after the state court allows such intervention due to the exception provided under 11 U.S.C. § 362(b)(4).

B. The Motion to Intervene Does Not Violate the Automatic Stay

The Bankruptcy Code specifically excepts certain state actions against a debtor from the automatic bankruptcy stay:

The filing of a petition under section 301, 302, or 303 of this title, or of an application under section 5(a)(3) of the Securities Investor Protection Act of 1970, does *not* operate as a stay . . . of *the commencement or continuation of an action or proceeding by a governmental unit* or any organization exercising authority . . . to *enforce such governmental unit's or organization's police and regulatory power*.

11 U.S.C. § 362(b)(4) (emphasis added).

In other words, “an action by a governmental unit to enforce its police and regulatory powers is excepted from the automatic stay so long as the action is not to enforce a money judgment.” *In re Mohawk Greenfield Motel Corp.*, 239 B.R. 1, 5–6 (Bankr. D. Mass. 1999). This exception ensures that the bankruptcy system does not become a haven for “debtors improperly seeking refuge under the stay in an effort to frustrate necessary government functions.” *United States v. Nicolet*, 857 F.2d 202, 207 (3d Cir. 1988).

Here, the State Court Litigation, upon intervention, will be excepted from § 362(a) because the Attorney General is seeking to enforce the State's police and regulatory powers by punishing and deterring acts of fraud committed by these defendants in violation of Florida's False Claims

Act. *See* 11 U.S.C. § 362(b)(4). The State is already the real party in interest in all Florida False Claims Act matters and the Attorney General’s intervention would merely be “a continuation” of the pending FCA matter.

On the jurisdictional question, a governmental unit that believes its proceedings are a valid exercise of its police and regulatory powers under § 362(b)(4), and thus excepted from an automatic stay, “is not required to petition the bankruptcy court for relief from the automatic stay prior to continuing its proceeding.” *In re Siskin*, 258 B.R. 554, 563 (Bankr. E.D.N.Y. 2001); *In re Glass*, 240 B.R. 782, 787 (Bankr. M.D. Fla. 1999). Because the State’s proceeding, upon intervention, would not be subject to the stay under § 362(b)(4), the filing of the Motion to Intervene likewise cannot violate the stay.

C. The State Court Litigation Will Be Excepted from the Automatic Stay Under § 362(b)(4) After Intervention

The State respectfully submits that this Court should then determine that no stay applies after the Attorney General is allowed to intervene in the State Court Litigation. To determine whether § 362(b)(4) applies, the courts have developed two tests: “the pecuniary purpose” and the “public policy” test. *In re Com. Oil Co.*, 847 F.2d 291, 294 (6th Cir. 1988). The focus of the pecuniary purpose test rests on whether the governmental action relates primarily to the protection of the government's pecuniary interest in the debtor's property (stayed) or to matters of public safety and welfare (not stayed). *In re Dunbar*, 235 B.R. 465, 471 (Bankr. App. 9th Cir. 1999), *aff'd*, 245 F.3d 1058 (9th Cir. 2001). The public policy test “distinguishes between proceedings that effectuate public policy and those that adjudicate private rights—only the former are exempted from the automatic stay.” *In re Herr*, 28 B.R. 465, 468 (Bankr. D. Me. 1983).

Courts have repeatedly held that intervened federal False Claims Act (“FCA”) cases fall squarely within the express § 362(b)(4) exception to the automatic stay. *See U.S. ex rel. Fullington*

v. Parkway Hosp., Inc., 351 B.R. 280, 288 (E.D.N.Y. 2006) (finding that “actions brought pursuant to the FCA enforce the [government]’s police or regulatory power because it serves the important public policy interest of deterring fraud upon the government.”). In one similar case, the federal government sought to enforce violations of the FCA against debtors who had filed for Chapter 11 bankruptcy. *In re Cmnw. Companies, Inc.*, 913 F.2d 518, 520 (8th Cir. 1990). In reversing the lower court’s rulings that the automatic stay applied to the federal government’s FCA claim, the Eighth Circuit found that the continuation of the FCA claim served to inflict the sting of punishment and deter fraud against the government, which is within its regulatory and police powers. *Id.*

Although one goal of an FCA claim is to make the government whole for monetary losses (a pecuniary interest), that fact does not outweigh the government’s interest in punishing and deterring acts of fraud. *See, e.g., In re Cmnw. Companies, Inc.*, 913 F.2d at 528; *Parkway Hospital*, 351 B.R. at 288 (“[T]he fact that the [government] is seeking monetary damages for past fraud does not prevent the application of the § 362(b)(4) exception.”); *S.E.C. v. Brennan*, 230 F.3d 65, 71 (2d Cir. 2000) (“It is well established that the governmental unit exception of § 362(b)(4) permits the entry of a money judgment against a debtor so long as the proceeding in which such a judgment is entered is one to enforce the governmental unit’s police or regulatory power.”). The United States Supreme Court has also provided some additional guidance, as the Court has “made a point of noting that ‘for the defendant even remedial sanctions carry the sting of punishment.’” *Id.* (quoting *U.S. v. Halper*, 490 U.S. 435, 447 (1989), abrogated on other grounds by *Hudson v. U.S.*, 522 U.S. 93 (1997); *see also U. S. v. Bornstein*, 423 U.S. 303, 310 (1976) (noting that the FCA was adopted for the purpose of punishing and preventing frauds).

Here, the State Court Litigation, upon intervention, is excepted from § 362(a) because the Florida Attorney General is seeking to enforce the State's police and regulatory powers by punishing and deterring acts of fraud committed by the Debtors in violation of Florida's False Claims Act. Moreover, the State's action relates to the safety and welfare of its citizens. The alleged misconduct of the Debtors directly impacts the funding of lifesaving 911 emergency services.

The State has a strong interest in regulating compliance with the billing and remittance requirements imposed on the Debtors and other telephone service providers by the Florida 911 statute. To that end, the conduct of the Debtors that the State views as being fraudulent and in violation of the Florida FCA is ongoing—the Debtors continue to bill, collect, and remit 911 fees using the same scheme and improper practices that violate Florida law. Therefore, the injunctive component of the relief sought by the State is of great significance.

The State of Florida's interest in enforcing its police and regulatory powers outweighs the pecuniary interest that will ultimately come to bear after the State of Florida prevails under its FCA claims.² In other words, while the State is seeking the entry of a money judgment against the Debtors for their violations of the Florida FCA, any such judgment would only fix the amount of the unsecured claim. *See, e.g., In re Commonwealth Companies, Inc.*, 913 F.2d at 520. Therefore, the State's claims against the Debtors under the Florida FCA are excepted under section 362(b)(4), given the primary statutory purpose of punishing and deterring acts of fraud against it.

² The Federal and Florida False Claims Act under 31 U.S.C. § 3729 and Fla. Stat. § 68.082 respectively, both seek to protect the government from the receipt of false or fraudulent payments. *See, e.g., Barati v. State*, 198 So. 3d 69, 71 (Fla. 1st DCA 2016) (noting that both the Federal and Florida False Claims Acts are "very similar").

Conclusion

Based on the foregoing, the Attorney General respectfully requests that the Court enter an Order finding that: (1) the State's motion to intervene in the State Court Litigation does not violate the automatic stay; and, (2) the automatic stay will not apply to the State Court Litigation after the state court allows such intervention.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was served via the CM/ECF electronic filing system and/or electronic mail on the 8th day of July 2019.

/s/ Russell S. Kent

Russell S. Kent

Exhibit 1

IN THE CIRCUIT COURT OF THE
SECOND JUDICIAL CIRCUIT, IN AND
FOR, LEON COUNTY, FLORIDA

State of Florida, *ex rel.* PHONE RECOVERY,
SERVICES, LLC, BRINGING THIS
ACTION ON BEHALF OF THE STATE
OF FLORIDA,

FIRST AMENDED *QUI TAM*
COMPLAINT

Case No. 2016 CA 2103

Plaintiff,

v.

WINDSTREAM COMMUNICATIONS,
LLC, WINDSTREAM FLORIDA, LLC,
WINDSTREAM NUVOX, LLC,
WINDSTREAM NORLIGHT, LLC
TALK AMERICA, LLC, THE OTHER
PHONE COMPANY, LLC, MCLEODUSA
TELECOMMUNICATIONS SERVICES,
L.L.C., PAETEC COMMUNICATIONS,
LLC, US LEC OF FLORIDA, LLC, US
LEC COMMUNICATIONS, LLC, and
NETWORK TELEPHONE, LLC,

Defendants.

FIRST AMENDED *QUI TAM* COMPLAINT AND DEMAND FOR JURY TRIAL

NOW COMES PLAINTIFF-RELATOR, Phone Recovery Services, LLC (“PRS”), by and through its attorneys, Andrew F. Knopf and Brent R. Bigger of Knopf Bigger, and brings this action under Florida’s False Claims Act, §§ 68.081, *et seq.*, Fla. Stat. (2015) to recover all damages, penalties, and other remedies established by the Florida False Claims Act on behalf of the State of Florida and itself, and shows the Court as follows:

OVERVIEW

1. This is a state *qui tam* action alleging that Windstream Communications, LLC, Windstream Florida, LLC, Windstream NuVox, LLC, Windstream Norlight, LLC, Talk America, LLC, The Other Phone Company, LLC, McLeodUSA Telecommunications Services, L.L.C., PAETEC Communications, LLC, US LEC of Florida, LLC, US LEC Communications, LLC, and Network Telephone, LLC (collectively referred to herein as “Windstream” or the “Defendants”) have violated the Florida False Claims Act by knowingly failing to properly bill, collect, and remit monthly E911 Fees to the State of Florida.

2. Florida, like many states, is struggling to fund the ever-growing costs of 911 emergency services. Although Florida has a statute that requires telephone service providers to bill, collect, and remit E911 Fees each month to fund 911 services, the Florida 911 Board has determined that only 43% of the costs are covered by E911 Fees.

3. One reason for the funding crisis is that the Defendants and certain other service providers do not bill the required number of E911 Fees to their customers. They do so in order to gain a competitive advantage over their competition. By not billing all the E911 Fees required by Florida law, the Defendants are able to charge less than their competitors but not impact their own profit margin. Meanwhile, Florida has to make-up the funding shortfall by diverting financial resources from other areas to 911 services.

4. The Defendants have violated the Florida False Claims Act by (1) submitting false remittance statements each month to the State of Florida that under-report the number of “subscribers” or “service identifiers” that are subject to the E911 Fee and (2) by submitting monthly invoices to their customers that under-state the number of E911 Fees that the customers are required to pay.

PARTIES

5. Plaintiff-Relator Phone Recovery Services, LLC (“PRS”) is and, at all relevant times, has been a limited liability company organized under the laws of the State of New Jersey.

6. Defendant Windstream Communications, LLC is a member of the “Windstream” family of companies. Windstream Communications, LLC and the other Defendants, which are also Windstream companies, collectively provide telephone services to customers in the State of Florida. At all relevant times, Windstream Communications, LLC was a Delaware limited liability company with its principal place of business at 1004 Rodney Parham Road, Little Rock, AR 72212. Windstream Communications LLC’s registered agent is CT Corporation System, 1200 South Pine Island Road, Plantation, FL 33324.

7. Defendant Windstream Florida, LLC is a member of the “Windstream” family of companies. Windstream Florida, LLC and the other Defendants, which are also Windstream companies, collectively provide telephone services to customers in the State of Florida. At all relevant times, Windstream Florida, LLC was a Florida limited liability company with its principal place of business at 4001 Rodney Parham Rd., Little Rock, AR 72212. Windstream Florida, LLC’s registered agent is CT Corporation System, 1200 South Pine Island Road, Plantation, FL 33324.

8. Defendant Windstream NuVox, LLC is a member of the “Windstream” family of companies. Windstream NuVox, LLC and the other Defendants, which are also Windstream companies, collectively provide telephone services to customers in the state of Florida. At all relevant times, Windstream NuVox, LLC was a Delaware limited liability company with its principal place of business at 4001 Rodney Parham Rd., Little Rock, AR 72212. Windstream NuVox, LLC’s registered agent is CT Corporation System, 1200 South Pine Island Road, Plantation, FL 33324.

9. Defendant Windstream Norlight, LLC is a member of the “Windstream” family of companies. Windstream Norlight, LLC and the other Defendants, which are also Windstream companies, collectively provide telephone services to customers in the state of Florida. At all relevant times, Windstream Norlight, LLC was a Kentucky limited liability company with its principal place of business at 4001 Rodney Parham Rd., Little Rock, AR 72212. Windstream Norlight, LLC’s registered agent is CT Corporation System, 1200 South Pine Island Road, Plantation, FL 33324.

10. Defendant Talk America, LLC is a member of the “Windstream” family of companies. Talk America, LLC and the other Defendants, which are also Windstream companies, collectively provide telephone services to customers in the state of Florida. At all relevant times, Talk America, LLC was a Delaware limited liability company with its principal place of business at 4001 Rodney Parham Rd., Little Rock, AR 72212. Talk America, LLC’s registered agent is CT Corporation System, 1200 South Pine Island Road, Plantation, FL 33324.

11. Defendant The Other Phone Company, LLC is a member of the “Windstream” family of companies. The Other Phone Company, LLC and the other Defendants, which are also Windstream companies, collectively provide telephone services to customers in the state of Florida. At all relevant times, The Other Phone Company, LLC was a Florida limited liability company with its principal place of business at 4001 Rodney Parham Rd., Little Rock, AR 72212. The Other Phone Company, LLC’s registered agent is CT Corporation System, 1200 South Pine Island Road, Plantation, FL 33324.

12. Defendant McLeodUSA Telecommunications Services, L.L.C. is a member of the “Windstream” family of companies. McLeodUSA Telecommunications Services, L.L.C. and the other Defendants, which are also Windstream companies, collectively provide telephone services

to customers in the state of Florida. At all relevant times, McLeodUSA Telecommunications Services, L.L.C. was an Iowa limited liability company with its principal place of business at 4001 Rodney Parham Rd., Little Rock, AR 72212. McLeodUSA Telecommunications Services, L.L.C.'s registered agent is CT Corporation System, 1200 South Pine Island Road, Plantation, FL 33324.

13. Defendant PAETEC Communications, LLC is a member of the "Windstream" family of companies. PAETEC Communications, LLC and the other Defendants, which are also Windstream companies, collectively provide telephone services to customers in the State of Florida. At all relevant times, PAETEC Communications, LLC was a Delaware limited liability company with its principal place of business at 4001 Rodney Parham Rd., Little Rock, AR 72212. PAETEC Communications, LLC's registered agent is CT Corporation System, 1200 South Pine Island Road, Plantation, FL 33324.

14. Defendant US LEC of Florida, LLC is a member of the "Windstream" family of companies. US LEC of Florida, LLC and the other Defendants, which are also Windstream companies, collectively provide telephone services to customers in the state of Florida. At all relevant times, US LEC of Florida, LLC was a North Carolina limited liability company with its principal place of business at 4001 Rodney Parham Rd., Little Rock, AR 72212. US LEC of Florida, LLC's registered agent is CT Corporation System, 1200 South Pine Island Road, Plantation, FL 33324.

15. Defendant US LEC Communications, LLC is a member of the "Windstream" family of companies. US LEC Communications, LLC and the other Defendants, which are also Windstream companies, collectively provide telephone services to customers in the State of Florida. At all relevant times, US LEC Communications, LLC was a North Carolina limited

liability company with its principal place of business at 4001 Rodney Parham Rd., Little Rock, AR 72212. US LEC Communications, LLC's registered agent is CT Corporation System, 1200 South Pine Island Road, Plantation, FL 33324.

16. Defendant Network Telephone, LLC is a member of the "Windstream" family of companies. Network Telephone, LLC and the other Defendants, which are also Windstream companies, collectively provide telephone services to customers in the state of Florida. At all relevant times, Network Telephone, LLC was a Florida limited liability company with its principal place of business at 4001 Rodney Parham Rd., Little Rock, AR 72212. Network Telephone, LLC's registered agent is CT Corporation System, 1200 South Pine Island Road, Plantation, FL 33324.

JURISDICTION AND VENUE

17. This action arises under the Florida False Claims Act, §§ 68.081, *et seq.*, Fla. Stat. (2015).

18. This is an action against Defendants for damages in excess of Fifteen Thousand Dollars (\$15,000), exclusive of interest, costs, and attorney's fees.

19. Defendants, Windstream Communications, LLC, Windstream Florida, LLC, Windstream NuVox, LLC, Windstream Norlight, LLC, Talk America, LLC, The Other Phone Company, LLC, McLeodUSA Telecommunications Services, L.L.C., PAETEC Communications, LLC, US LEC of Florida, LLC, US LEC Communications, LLC, and Network Telephone, LLC submitted themselves to the jurisdiction of this Honorable Court by doing personally, or through their agents, at all times material to this action, the following acts:

- (a) Conducting and engaging in substantial business and other activities in Florida by selling phone services throughout the state of Florida to Florida consumers;

- (b) Committing a tortious act within this state by failing to bill and remit the full required amount of E911 Fees to the State of Florida in violation of §§ 365.171, *et seq.*, Fla. Stat. (2015); and
 - (c) Committing a tortious act within this state by submitting false claims to the State of Florida in violation of §§ 68.081, *et seq.*, Fla. Stat. (2015).
20. Venue is proper in this Court pursuant to § 68.083(3), Fla. Stat. (2015).
21. This action is not based upon allegations or transactions that have been publicly disclosed.

FACTUAL ALLEGATIONS

A. Florida's 911 Emergency Telephone System

22. The Florida Emergency Communications Number E911 State Plan Act, §§ 365.171, *et seq.*, Fla. Stat. (2015) ("the Act"), sets forth the provisions by which the emergency telephone system (commonly known as the "911 System") has been established in Florida, including certain details of its management, operations, and funding.

23. The 911 System is a system used in North America that links emergency callers with the appropriate public resources, as may be required in an emergency, such as police, fire, and medic first responders. Emergency callers are able to access the system by simply dialing the digits 9-1-1.

24. The Florida E911 Board (hereinafter "911 Board") was established in 2007 to administer, with oversight by the Technology Program within the Department of Management Services, the E911 Fee, including receiving revenues derived from the fee, distributing those revenues, accounting for receipts and distributions of the fee, and making certain reports to the Governor and the Legislature.

25. The powers and duties of the Florida E911 Board are set forth in § 365.172(6), Fla. Stat. (2015).

26. The 911 System in Florida is funded through a fee (“E911 Fee”) billed by voice communication service providers to subscribers of voice communications services. “Voice communications services” include all two-way voice service transmitted through any technology that provides access to E911 services. *See* § 365.172(3)(cc), Fla. Stat. (2015).

27. Voice communications services providers are required to bill and collect the E911 Fee from their subscribers and then remit the collected fees to the E911 Board. § 365.172(8), Fla. Stat. (2015).

28. For wired voice service, the providers must bill the E911 Fee “based on the number of access lines having access to the E911 system, on a service-identifier basis, up to a maximum of 25 access lines per account bill rendered.” § 365.172(8)(a)(1), Fla. Stat. (2015). The Act further provides that wired voice communications service providers shall bill the E911 Fee to subscribers “on a basis of five service-identified access lines for each digital transmission link, including primary rate interface service or equivalent Digital-Signal-1-level service, which can be channelized and split into 23 or 24 voice-grade or data-grade channels for communications, up to a maximum of 25 access lines per account bill rendered.” § 365.172(8)(a)(2), Fla. Stat. (2015).

29. Therefore, the E911 Fee must be billed by the service providers as follows based on the type of service delivered to the customer:

- Traditional PRI and Other “Channelized” Services – an E911 Fee is assessed for up to five (5) access lines per service connection or link, for a maximum of twenty-five (25) E911 Fees in total that can be billed to a customer’s account; and

- VoIP and Other Non-Channelized Services (such as broadband) – an E911 Fee is also assessed on each “service identifier,” which for VoIP and other non-channelized services is each active telephone number or device, up to a maximum of twenty-five (25) E911 Fees in total that can be billed to a customer’s account.

30. State and local governments are not subscribers under the Act.

31. Effective July 1, 2007, the State of Florida set the monthly E911 Fee at \$0.50 per service identifier.¹ Providers are required to remit all E911 Fees, less a 1% provider allowance, to the E911 Board within 60 days after the end of the month in which the fee was billed. The proceeds of these fees are deposited into a fund administered by the E911 Board. § 365.172(8)(d)-(e), Fla. Stat. (2015).

32. The E911 Fee is not a tax. All revenues derived from the E911 Fee levied on subscribers must be paid by the E911 Board into the State Treasury on or before the 15th day of each month. Such moneys must be accounted for in a special fund to be designated as the Emergency Communications Number E911 System Fund, a fund created in the Technology Program, or other office as designated by the Secretary of Management Services, and, for accounting purposes, must be segregated into (a) the wireless category and (b) the non-wireless category. § 365.173(1), Fla. Stat. (2015).

33. The ever-increasing burdens facing the E911 systems could be alleviated in part by full compliance with the billing, collection and remittance requirements of the Act, which would dramatically increase the funding available for the 911 Systems.

34. As explained more fully below, revenues from E911 Fees currently cover less than half of the operation costs of 911 services.

¹ Effective January 1, 2015, the E911 Fee was reduced to \$0.40 per service identifier.

35. Many telephone service providers comply with the Act's requirements for billing and remitting E911 Fees. The Defendants do not. Their failure to bill and collect E911 Fees forces the state to use other financial resources to cover the costs of emergency services, and it places providers who follow the Act's requirements at a competitive disadvantage.

36. One of the primary purposes of the E911 Fee is to fund the operations of Public Safety Answering Points (PSAPs) – the public safety agency that receives an incoming 911 call and dispatches appropriate public safety agencies to respond to the call. § 365.172(10)(b), Fla. Stat. (2015).

37. There are PSAPs in operation throughout the State of Florida. The PSAPs are organized by population and geography so that an emergency 911 call for help goes to a nearby PSAP (if not the nearest PSAP) such that emergency dispatch, and help, can arrive as soon as possible to the persons in need.

B. Windstream's Wireline Telephone Service in Florida

38. The Defendants do business under the "Windstream" name and are all affiliates or "sister companies." The Defendants are wireline telecommunications services providers and/or exchange companies, as well as providers of VoIP services. These entities provide such services to Florida residents and businesses for monthly fees pursuant to various customer agreements.

39. The Federal Communications Commission ("FCC") allocates approximately 49.4 million wireline telephone numbers for use in Florida. Of those allocated telephone numbers, approximately 20 million are estimated to be active in Florida.

40. Many of the phone numbers that the FCC assigns to a carrier are not in use at any given time. Thus, the FCC requests phone number usage statistics from telephone providers on a national basis. The FCC then calculates ratios to estimate the number of telephone numbers expected to be active: 47% of the numbers assigned to the Incumbent Local Exchange Carrier

(“ILEC”) (typically the local successor to the Baby Bell that existed after the breakup of AT&T in the 1980s) will be in use; and 34% of the numbers assigned to Competitive Local Exchange Carriers (“CLEC”) will be in use.

41. Of the assigned telephone numbers in Florida, the FCC calculates that 47% of the numbers assigned to AT&T and Verizon are active because AT&T (through its BellSouth and Teleport subsidiaries) and Verizon (through its subsidiaries) are the ILEC’s throughout much of Florida. The FCC calculates that 34% of the numbers assigned to other carriers (CLEC’s) are active. Applying these use ratios in Florida leads to reasonable conclusions about how many active telephone numbers are assigned to the Defendants in this action.

42. Windstream operates as a CLEC in the areas in which it does business in Florida. Therefore, approximately 34% of the telephone numbers assigned by the FCC to Windstream in Florida area active.

43. The Defendants, which are all Windstream companies, collectively have approximately 2.9 million telephone numbers allocated to them by the FCC. Of those, approximately 987,020 are estimated to be active telephone numbers in Florida.

C. The Evolution of Technology in Telephone Services and its Impact on the Billing and Collection of E911 Fees

44. When the telecommunications industry began, homes and businesses were connected by and communicated via individualized copper wires. These access lines were only capable of supporting one voice conversation at a time.

45. As technology advanced, hardware and software was developed that was able to break the copper wires into twenty-three separate coordinated “time slots.” Conversations could then be split into parts and distributed through these pre-determined time slots. These snippets of

conversations were then transmitted and compiled on the receiver's end. This process is known as time division multiplexing (“**TDM**”).

46. With digital protocols known as primary rate interface (“**PRI**”), which coordinated the time slots, TDM allowed telecommunication companies to carry up to twenty-three simultaneous voice conversations over a single wire connection.

47. As not every telephone device will be used to make a call at all times, a PRI-based connection can actually support hundreds of telephone devices. Indeed, the industry standard is to apply a “trunking ratio” that assumes that each available channel can support five to eight telephone numbers. Thus, a single twenty-three channel PRI can support between 115 and 184 telephone numbers.

48. Through a private branch exchange (“**PBX**”), companies are able to create and maintain telephone systems that take advantage of this “trunking ratio.” The PBX device is housed at a company's facility and coordinates telephone transmissions over the lines.

49. Moreover, the development of ubiquitous broadband service has prompted another shift in the provision of telephone service, particularly for business customers – the use of voice over internet protocol, commonly referred to as “VoIP.”

50. In essence, VoIP telephone services route and support telephone calls over the Internet or a private IP-based network.

51. The FCC has defined VoIP as a service that “(1) [e]nables real-time, two-way voice communications; (2) [r]equires a broadband connection from the user's location; (3) [r]equires Internet protocol-compatible customer premises equipment (CPE); and (4) [p]ermits users generally to receive calls that originate on the public switched telephone network and to

terminate calls to the public switched telephone network.” 47 C.F.R. § 9.3. The Act specifically relies on and incorporates the FCC’s definition. § 365.172(3)(cc), Fla. Stat. (2015).

52. The critical distinction that the FCC draws between traditional local exchange service and Interconnected VoIP lies entirely with the type of connection used between the phone providers’ facility and the customers’ premises – if that connection is a channelized connection using TDM then the service provided is traditional, but if the connection from the provider to the customers’ premises is Ethernet, Asynchronous Transfer Mode (ATM) or any other broadband circuit, even if it is converted to TDM or simulates TDM on the customers’ premises (using an integrated access device (IAD), for example), then the service is VoIP.

53. The FCC has described the distinction between VoIP and traditional service as follows:

Interconnected VoIP service uses IP packet format to transmit voice calls *between* the end-user customer’s specialized equipment (such as an IP telephone, IP PBX, or TDM-to-IP converter device that is attached to an ordinary telephone or conventional PBX) and the telecommunications network. *By contrast*, local exchange telephone service uses analog or Time Division Multiplexing (TDM) to transmit voice calls *between* the end-user customer’s device and the *public switched telephone network*. Note that some end-user customer devices (such as an IP PBX or conventional PBX) can be configured to connect to both local exchange telephone service and interconnected VoIP service, but the two types of service connections are distinct. A single end-user service connection *cannot be both* interconnected VoIP service and local exchange telephone service at the same time.

See Glossary of Terms, FCC Form 477 Instructions, located at: www.fcc.gov/form477/477inst.pdf, p. 35.

54. Though VoIP is a service that requires the use of the Internet or a private IP-based network, it still uses a wire or wires to connect a customer with a telephone service.

55. Unlike a PRI, which splits the wire into twenty-three separate channels, a VoIP connection breaks telephone transmissions into data packets. These “packetized” bits of information are not limited to specific channels of transmission and are instead able to take millions of different pathways across the Internet. They are then reassembled at their destination.

56. Even if a company uses a traditional PBX and traditional telephones on its premises, it often uses an IP-based integrated access device ("**IAD**") to convert the in-house TDM signals to VoIP, still on the customer's premises. This configuration is explicitly identified as VoIP service by the FCC. The IP-enabled IAD on the customer's premises manages and coordinates these packets as they are transmitted, merging VoIP voice traffic and Internet data packets on a single IP-based connection to the Internet. This service, called Integrated Service, effectively coordinates the transmission of data packets and voice packets over a single IP- based internet connection in the same way the ISDN PRI service coordinates up to 23 phone conversations over one copper wire.

57. Also, a PBX device frequently includes an IP-enabled broadband connection to and from the customer's premises and a single IP-compatible device used to convert TDM based voice within the customer's premises to IP-based voice. Thus, the PBX device converts on-site traditional voice into packetized data, rendering it VoIP service that is sent outside of the business or organization over the web, to the recipient of the phone call.

58. Unlike ISDN PRI service, the single IP-based connection is not limited to only 23 channels that can handle a single phone call at one time. Depending on the amount of data that it can transmit at once, and how much bandwidth is being used for other applications, that IP-based connection can handle far more than 23 channels for simultaneous conversations.

59. Given the FCC's definition of VoIP, most business accounts – even accounts that providers label as “PRI” – fall within the FCC's definition of VoIP.

60. The FCC's definition and the Defendants' misapplication of it have a significant impact on the E911 Fees billed, collected and remitted to Florida. With large customers, this practice can reduce Florida's E911 Fee revenue to 20% of what should properly be collected.

61. The Act dictates that all PRI circuits that are channelized should be charged five (5) E911 Fees. VoIP service, however, is to be charged on a per service identifier basis, with the cap of 25 total E911 Fees per customer. If a customer's circuit is mischaracterized as a PRI when, in fact, it is a VoIP circuit per the FCC, that customer will be billed only five (5) E911 Fees when they should properly be billed twenty-five (25) E911 Fees, assuming there are at least twenty-five service identifiers in use.

D. PRS Utilizes Private Information and its Unique Expertise to Detect Windstream's Practice of Under-Billing and Under-Remitting of E911 Fees

62. PRS has investigated telecommunications firms and other providers of telephone services operating in Florida and other areas. As explained below, PRS has experience in the telecommunications industry and with the payment of E911 Fees in particular. Indeed, as also explained below, through work performed in other jurisdictions, PRS has learned about the practices of Windstream throughout the country.

63. PRS has experience in auditing telephone providers' adherence to state 911 statutes in Alabama, Georgia, Delaware, Pennsylvania and Louisiana and is involved in active E911 Fee recovery efforts in more than fifteen additional states.

64. With the benefit of its national experience and expertise, PRS is well-suited to define the scope of Windstream's “under-collection practice” in Florida and to quantify the potential retroactive recovery by Florida for the under-collections.

65. PRS's founder, Roger Schneider, was the first to uncover that Windstream and certain other phone companies had been engaged in a nationwide effort to purposefully and systematically under-remit E911 Fees.

66. In 1993, Schneider became a member of the volunteer Board of Commissioners for the Emergency 911 District in Madison County (the "Madison County 911 Board"), which includes his home city of Huntsville, Alabama.

67. A member of the Madison County 911 Board, Schneider brought his knowledge of technology to the table – his extensive experience installing, managing, and implementing complex telephone systems for businesses, government offices and political organizations.

68. Schneider became very familiar with the complex 911 laws and regulations requiring telecommunications companies to charge certain fees for any telephone that can be used to call 911 in order to properly fund the municipal emergency 911 call-in operations.

69. During the time Schneider was serving on the Madison County 911 Board, he was also moving his business into new offices in Huntsville, Alabama. While researching telephone service options for the new location, Schneider was approached by the sales person from a major telecommunications firm who told Schneider that her firm could provide a savings on 911 fees compared to what he was currently paying for service at his then current location.

70. While he learned of the fraud in his individual capacity as a business owner, as a member of the Madison County 911 Board, Schneider knew not only the illegality of the salesperson's suggestion, but also that doing so would allow the carrier to cheat the 911 district out of critically needed funds for emergency 911 operations.

71. Schneider immediately alerted his colleagues. Following an investigation and failed settlement discussions, the 911 Board sued the carrier.

72. A federal court in Alabama granted summary judgment in favor of the Madison County 911 Board on the primary issue in the case, namely that the carrier was under-remitting 911 fees to Madison County. Given this unfavorable ruling, the carrier settled with the Madison County 911 Board shortly thereafter and paid a confidential settlement amount. Most importantly, however, the carrier promised to cease this practice not just in Madison County but throughout the State of Alabama. That promise implicitly acknowledged that the conduct was not limited to Madison County; it was far more pervasive. That case was one of the first, if not the first, such actions in the country, and it was brought about as a result of Schneider's investigation, discovery and testimony.

73. Schneider, in his individual capacity, began to investigate other telecommunications companies to determine if they were also under-remitting E911 Fees. He discovered that the issue was indeed more widespread and that other telecommunications companies in Madison County were not properly remitting the fees.

74. The Madison County 911 Board, therefore, asked Schneider, in his individual capacity, on a pro bono basis, to pursue other audits and litigation on behalf of the Madison County 911 District. This request was predicated in part on the fact that Schneider's company by then had new telephone providers, and it was clear from Schneider's new phone bills that these other providers were also under-billing E911 Fees. The audits and lawsuits in Madison County consistently revealed that certain phone companies improperly, and systematically, under-billed and therefore under-remitted E911 Fees and that their conduct was the same across many jurisdictions.

75. This fraud has gone undetected because the offending telecommunications companies actively conceal it by submitting false remittance reports to the government where

they do business. They have succeeded because regulators do not have the information or tools to obtain key information, such as: the number of active lines in use by each telecommunications company, the number of lines for which the telecommunications companies were remitting 911 fees, the number of lines or telephone numbers in use by a particular customer, the number of 911 fees being billed to the customer, and the number of lines for which the companies were not remitting 911 fees.

76. In Florida, as in other states, the Act permits only “service suppliers” – such as Windstream – to bill, collect and remit the E911 Fees.

77. Thus, the Defendants have virtually exclusive possession of the information related to the E911 Fees. The 911 Board and the State of Florida do not possess the information necessary to detect the fraudulent practice.

78. Despite these barriers, PRS has determined that that the Defendants consistently under-bill, under-collect, and under-remit 911 fees.

79. First and foremost, PRS has collected private customer invoices from the Defendants that reveal the Defendants’ practice of failing to bill all the E911 Fees required by the Act. Customer invoices, which are not provided by the Defendants to the E911 Board, provide direct proof of the Defendants’ violation of the Act and their corresponding practice of making and submitting false claims.

80. In addition to collecting private phone bills, PRS has used its knowledge-base and expertise to separately verify that that the Defendants have violated the Act and submitted false claims to the State of Florida. PRS can determine the approximate number of active lines in use, the number of lines for which the E911 Fees have been remitted, and the number of lines for

which they have not been remitted. Prior to PRS's work, no individual, regulatory body or government entity had been able to do so.

81. PRS has compiled a considerable volume of information showing that certain telecommunication companies throughout the United States are under-remitting E911 Fees as required by law, including over 10,000 phone bills collected from almost every state in the United States. PRS has also amassed a variety of electronic records, including business and direct mail leads, containing over 50 million telephone numbers used in various 911 jurisdictions in various states and throughout the United States.

82. Using a proprietary method that it developed, PRS can determine the amount of under-remittances using evidence collected as a result of its investigations, including actual phone bills and proprietary formulae.

83. More specifically, PRS analyzes both the number of phone numbers the FCC assigns to each carrier, taking into consideration the applicable FCC use-ratio, and the "local number portability" ("**LNP**") data available for Florida, which tracks the inflow and outflow of customers for each service provider (i.e., the net loss or gain of numbers in a given year).

84. The LNP data, compiled in a "local number portability database" (the "**LNP Database**"), tracks phone numbers that move from one carrier to another when a customer changes telecommunications providers and keeps its phone number(s). Because numbers in the LNP Database are all phone numbers that a customer has asked to transfer, most of them are "active."

85. By examining the last six years of the LNP Database, PRS can determine whether a carrier has experienced a net inflow or outflow of phone numbers. PRS then adds the net flow

of numbers from the LNP Database to the projected number of active numbers for each carrier to determine the number of active numbers that that carrier has in Florida.

86. Specifically, PRS compares the FCC's projected number of lines in use within Florida with the LNP data to determine which analysis yields the most accurate estimate. Then, PRS reduces that projected number of in-use lines by 50% (for Florida) in order to ensure a conservative estimate. This 50% reduction is intended to account for the Act's caps and exemptions on E911 Fees.

87. Having determined a reasonable estimate of each carrier's number of active billable lines, PRS then examines the number of lines on which each carrier remits E911 Fees. The difference between the two is the estimated number of lines on which the carrier under-remitted E911 Fees.

88. PRS must perform this analysis because the carriers will not provide the requisite information (such as the exact number of active numbers that they have in Florida), and the Florida 911 Board has no ability to compel the production of that information.

E. Florida's 911 Funding Deficit

89. PRS's work is critical because the burden faced by the 911 systems only continues to grow as the ways in which emergency services are deployed and/or utilized continues to expand, such as the "Statewide Text-to-911 Initiative."

90. The 911 Board has acknowledged that Florida's 911 system has a shortage of funding. In fact, the 911 Board's latest report to the Governor of Florida states: "Since 2006, E911 fee revenue collected statewide only covers a portion of county and service provider E911 costs. In the counties' fiscal year 2013-14, the total combined E911 fee revenues were

\$101,663,331 with total E911 expenditures of \$207,232,557.”² Clearly, there is a need for additional E911 Fee revenue.

91. The financial burden faced by the 911 system is growing. The 911 Board has also observed: “While revenues are decreasing, the costs of the 911 call transport circuits are increasing. LEC E911 trunking and database costs are billed directly to the counties and are based on schedules and tariffs. Counties are also incurring additional IP circuit costs to begin the migration to NG-911.” *Id.*

92. Despite these financial challenges, Florida has not had access to the information needed to uncover the Defendants’ practice of under-billing and under-remitting E911 Fees. Doing so requires the review of private customer invoices coupled with the unique knowledge and set of information that Schneider possesses.


F. Windstream Knowingly Under-Charges and Under-Remits E911 Fees to the State of Florida

93. The Defendants routinely fail to charge the correct amount of E911 Fees or fail to charge E911 Fees at all. As a consequence, the Defendants do not remit the correct amount of E911 Fees to the State of Florida.

94. The Defendants employ various under-billing practices for E911 Fees. One such practice, as described above, is to categorize VoIP service as PRI service in order to take advantage of the Act’s cap of five E911 Fees per PRI. Another practice is to charge E911 Fees for VoIP service based on purported “concurrent call” capability. The “concurrent call” capability is not, however, an actual limitation on the number of simultaneous calls that can be made. Moreover, the Act does not use “concurrent” or simultaneous calling capabilities as a basis for determining the number of E911 Fees that should be billed to a customer.

² See Florida E911 Board 2014 Annual Report at www.dms.myflorida.com/content/download/114738/634133/2014_Annual_Report_Post_Final.pdf.

95. PRS has several examples of the fraudulent billing practices of the Defendants. For instance, the Windstream bill discussed and highlighted below is for a law firm with offices throughout Florida. Windstream charged the law firm for one business line and for one fiber optic service (listed as PRI T1), providing service that would support 120 telephone numbers. Therefore, Windstream should have charged twenty-five (25) 911 fees. However, Windstream only charged two 911 fees for this account, one for the PRI T1 and one for the additional business line. The shortfall for this account is either \$11.00 or \$11.50.



PAETEC

ATTN: Customer Care
800 Willowbrook Office Park
Fairport, NY 14450

Billing Invoice

Return Service Requested


☐ Check here for change of address (note changes below)

CORAL GABLES, FL 33134

| Account Number | Invoice Date | Total Amount Due |
|----------------|--------------|------------------|
| | Dec 08, 2011 | |

| Invoice Number | Due Date | Amount Enclosed |
|----------------|--------------|-----------------|
| | Jan 07, 2012 | |

PAETEC
P.O. Box 1283
Buffalo, NY 14240-1283



PAETEC

ATTN: Customer Care
800 Willowbrook Office Park
Fairport, NY 14450

Summary of Charges - Invoice

PREVIOUS BALANCE
Payments - Thank You

Balance Forward - Due upon receipt

Monthly Charges
Usage Charges
Credits
Other Charges
Taxes and Surcharges

New Charges - Due by Jan 07, 2012

TOTAL INVOICE AMOUNT


| Account Number | Invoice Date | Total Amount Due |
|----------------|--------------|------------------|
| | Dec 08, 2011 | |

Important Messages

PAETEC Protects Your CPNI Rights
In order to inform you of other PAETEC products and services that may benefit you, PAETEC may wish to access information related to your account(s), particularly information known as Customer Proprietary Network Information (CPNI). Information constituting CPNI includes the kinds of services you have, how you use them, and how they are billed. If you do not want PAETEC to access and use your CPNI, please contact Customer Care at the number listed on your invoice and indicate your preference. Additional information regarding CPNI and your rights may be found at www.paetec.com/about-us/notice/cpni.html.

PAETEC Standard Terms & Conditions
For general information regarding PAETEC's Standard Terms & Conditions, visit www.paetec.com/about-us/notice/terms-conditions.html

Monthly Charges



PAETEC Online
Manage your PAETEC services directly and review invoice details, charge descriptions, and payment history at www.paeteconline.com.

Contact Us

Billing: 877.340.2600 or www.paeteconline.com
E-mail: customercare@paetec.com
Repair: 877.340.2555
Web site: www.paetec.com

personalizing business communications

Page 1

| PAETEC | | ACCOUNT SUMMARY | |
|-----------------|---------------------|-----------------|------------|
| DATE OF INVOICE | 12/08/11 | INVOICE NUMBER | [REDACTED] |
| INVOICE PERIOD | 11/08/11 - 12/07/11 | ACCOUNT NUMBER | [REDACTED] |
| | | PAGE | 5 |

| ACCOUNT SUMMARY | | | | | | |
|-----------------|--------------|-----------------|---------------|-------------------------|--------------------|------------|
| Account Number | Account Name | Monthly Charges | Usage Charges | Other Charges & Credits | Surcharges & Taxes | TOTAL |
| [REDACTED] | [REDACTED] | [REDACTED] | [REDACTED] | [REDACTED] | [REDACTED] | [REDACTED] |

| ACTIVITY FOR ACCOUNT | | | |
|-------------------------|------------------------------|----------|--------|
| MONTHLY CHARGES | | | |
| Period | Description | Quantity | Cost P |
| 12/09/2011 - 01/07/2012 | PRI T1 | | |
| 12/09/2011 - 01/07/2012 | DID Station Number(s) Charge | | |
| 12/09/2011 - 01/07/2012 | FSLC Charge | | |
| 12/09/2011 - 01/07/2012 | Business Line | | |
| 12/09/2011 - 01/07/2012 | Call Forwarding | | |
| TOTAL MONTHLY CHARGES | | | |

| USAGE CHARGES | | |
|------------------------------------|-------|---------|
| Description | Cells | Minutes |
| In State 80X Charges | 16 | 99.9 |
| In State Long Distance Charges | 128 | 354.9 |
| Out of State Long Distance Charges | 35 | 141.5 |
| Regional Long Distance Charges | 92 | 264.7 |
| Regional 80X Charges | 20 | 53.8 |
| Local Directory Assistance Charges | 3 | 0.0 |
| Out of State 80X Charges | 8 | 9.2 |
| TOTAL USAGE CHARGES | 303 | 924.0 |

20 numbers per each of the 6 units. 120 available extra numbers

The customer has one fiber optic line which is listed as PRI but with the possibility of 120 additional lines is most likely VoIP. Also billed is one single business line. Each of these is charged only one 9-1-1 fee.

PAETEC

DATE OF INVOICE: 12.08.11
INVOICE PERIOD: 11.08.11 - 12.07.11

INVOICE NUMBER: [REDACTED]

ACCOUNT SUMMARY

| ACTIVITY FOR ACCOUNT (CONT'D) - [REDACTED] | |
|--|-----------------|
| SURCHARGES AND TAXES (CONT'D) | |
| Description | Amount |
| Federal Excise Tax | \$13.85 |
| 911 | \$1.00 |
| FL Telecom Relay Service Surcharge | \$0.22 |
| FL Communications Services Tax | \$45.93 |
| FL Municipal Communications Services Tax | \$28.62 |
| TOTAL SURCHARGES AND TAXES | \$100.22 |

HOW YOUR CHARGES ARE BILLED

Your telephone bill includes two types of service charges:

REGULATED SERVICE CHARGES: Charges for local telephone service regulated by your state regulatory agency. These charges will be notated in the summary section.

NONREGULATED CHARGES: Charges for toll services and other services not regulated by your state regulatory agency. (Toll charges - charges for both regional and long distance toll calls.)

Please note that nonpayment of regulated charges may result in discontinuance of local service.

Handwritten red notes:
"only two 9-1-1 fees for what may be as many as 120 telephones. should be charged at the 25 identifier cap or if actually a PRI five."

96. In the Windstream bill discussed and highlighted below, Windstream provides six lines for a medical practice in Florida. Windstream charges for and reverses the 911 fees charged to this account. Windstream should collect a 911 fee for each of the six lines, which would be a monthly total of \$3.00. § 362.172 Fla. Stat. (2015).

97. Windstream commonly engages in this practice of charging customers a 911 fee and then reversing that fee. There is no justification in the statute for such a reversal. Windstream is still responsible for collecting the 911 fee from subscribers "based on the number of access lines having access to the E911 system, on a service-identifier basis, up to a maximum of 25 lines per account bill rendered." § 362.172 Fla. Stat. (2015).

| windstream _® connecting business to business | | Important Messages | |
|--|--|--------------------|--------|
| Invoice Information | | 1 | 100174 |
| Account Number: | | | |
| Invoice Date: | | | |
| Due Date: | | | |
| Total Due: | | | |
| Summary Of Charges | | | |
| Previous Balance and Payments | | | |
| Previous Balance | | | |
| Payments Received - Thank You | | | |
| Adjustments | | | |
| Balance Forward | | \$0.00 | |
| Current Charges For All Services | | | |
| Services | | | |
| Usage | | 2.00 | |
| Other Charges and Credits | | 0.00 | |
| Taxes and Fees | | | |
| Total Current Charges | | | |
| Total Due | | | |
| CONTACTING US | | | |
| Services/Billing 1-800-600-5050 | | M-F 8am 6pm | |
| Repair Services 1-800-600-5050 | | 24 hours | |
| Visit us at www.windstream.com | | | |

windstream_®
connecting business to business

Invoice Date:
01/17/2011

Location Summary Information

| | |
|-------------------------------|---------------|
| Previous Balance | 545.72 |
| Payments Received - Thank You | -545.72 |
| Adjustments | 0.00 |
| Balance Forward | 0.00 |
| Current Charges | |
| Services | 516.00 |
| Usage | 2.56 |
| Taxes and Fees | 30.97 |
| Total Current Charges | 549.53 |

Payments and Adjustments

| | |
|------------------------------------|---------------|
| Payments | Amount |
| 01/04 Payment Received - Thank You | |
| Total Payments | |

Summary of Current Charges

| Services | Qty | Amount | |
|----------------------------------|--------------|-----------------|---------------|
| Account Services | | | |
| Broadline-5 Lines 768K | 1 | 455.27 | |
| ArmorLine - | 1 | 4.99 | |
| Paper Billing Fee | 1 | 2.03 | |
| 3 Year Term | 1 | 0.00 | |
| 2,500 Minute Domestic Pkg | 1 | 0.00 | |
| Total Account Services | | \$462.29 | |
| Dedicated Services | | | |
| DS-1 Access | 1 | 0.00 | |
| IAD-Adtran 608 FR | 1 | 0.00 | |
| Total Dedicated Services | | \$0.00 | |
| Internet Services | | | |
| Equipment Maintenance Fee | 1 | 10.95 | |
| IP Administration Fee | 1 | 3.46 | |
| Pkg Web 50MB/20 Email/6GB Xfer | 1 | 0.00 | |
| Network Address Translation-NAT | 1 | 0.00 | |
| 768K Dedicated | 1 | 0.00 | |
| Total Internet Services | | \$14.41 | |
| Local Services | | | |
| Flat Rate Business Line - | 1 | 23.92 | |
| Fed'l Subscriber Line Charge Fee | 1 | 7.84 | |
| Network Cost Recovery Fee | 1 | 4.31 | |
| State 911 Recovery Surcharge | 6 | 3.00 | |
| Regulatory Access Fee | 1 | 2.27 | |
| Local Number Portability Fee | 1 | 0.35 | |
| State Telecom Relay Service Fund | 1 | 0.11 | |
| Broadline 4 Business Line | 5 | 0.00 | |
| Call Restriction-976/900 - | 1 | 0.00 | |
| Published Listing | 1 | 0.00 | |
| Wide Area Calling Plan | 5 | 0.00 | |
| Hunting | 2 | 0.00 | |
| Call Forwarding Variable | 2 | 0.00 | |
| 911 Surcharge Reversal | 5 | 2.50 CR | |
| Total Local Services | | \$39.36 | |
| Total Services | | \$516.00 | |
| Usage | Calls | Min | Amount |
| Domestic | 102 | 112.90 | 0.00 |
| Extended Domestic | 2 | 1.30 | 0.06 |

Summary of Current Charges cont'd

| Usage continued | Calls | Min | Amount |
|-------------------------------|------------|---------------|-----------------|
| Operator Assistance | 2 | 2.00 | 2.50 |
| Total Usage | 106 | 116.20 | \$2.56 |
| Taxes and Fees | | | Amount |
| Federal Tax | | | 1.22 |
| Fed Universal Service Fund | | | 4.22 |
| State Tax | | | 15.71 |
| Local Tax | | | 9.82 |
| Total Taxes & Fees | | | \$30.97 |
| Total Current Charges | | | \$549.53 |

Detailed Charges By Service Item

| Services | Qty | Amount |
|-------------------------------|---------------------|---------------|
| Account Services | | |
| Charles L Clay D.O. | | |
| ArmorLine - | 01/15/11 02/14/11 1 | 4.99 |
| Paper Billing Fee | 01/15/11 02/14/11 1 | 2.03 |
| 3 Year Term | 01/15/11 02/14/11 1 | 0.00 |
| Subtotal | | \$7.02 |
| Total Account Services | | \$7.02 |
| Total | | \$7.02 |

SMARTCHOICE-5 LINES

| Services | Qty | Amount |
|---------------------------------|---------------------|-----------------|
| Account Services | | |
| 105-953-03 | | |
| Broadline-5 Lines 768K | 01/15/11 02/14/11 1 | 455.27 |
| 2,500 Minute Domestic Pkg | 01/15/11 02/14/11 1 | 0.00 |
| Subtotal | | \$455.27 |
| Total Account Services | | \$455.27 |
| Dedicated Services | | |
| 105-953-04 | | |
| IAD-Adtran 608 FR | 01/15/11 02/14/11 1 | 0.00 |
| DS-1 Access | 01/15/11 02/14/11 1 | 0.00 |
| Subtotal | | \$0.00 |
| Total Dedicated Services | | \$0.00 |
| Internet Services | | |
| 105-953-04 | | |
| Equipment Maintenance Fee | 01/15/11 02/14/11 1 | 10.95 |
| IP Administration Fee | 01/15/11 02/14/11 1 | 3.46 |
| Network Address Translation-NAT | 01/15/11 02/14/11 1 | 0.00 |
| 768K Dedicated | 01/15/11 02/14/11 1 | 0.00 |
| Pkg Web 50MB/20 Email/6GB Xfer | 01/15/11 02/14/11 1 | 0.00 |
| Subtotal | | \$14.41 |
| Total Internet Services | | \$14.41 |
| Local Services | | |
| State 911 Recovery Surcharge | 01/15/11 02/14/11 1 | 0.50 |
| Broadline 4 Business Line | 01/15/11 02/14/11 1 | 0.00 |
| Wide Area Calling Plan | 01/15/11 02/14/11 1 | 0.00 |
| 911 Surcharge Reversal | 01/15/11 02/14/11 1 | 0.50 CR |
| Subtotal | | \$0.00 |
| State 911 Recovery Surcharge | 01/15/11 02/14/11 1 | 0.50 |
| Call Forwarding Variable | 01/15/11 02/14/11 1 | 0.00 |
| Broadline 4 Business Line | 01/15/11 02/14/11 1 | 0.00 |
| Wide Area Calling Plan | 01/15/11 02/14/11 1 | 0.00 |
| 911 Surcharge Reversal | 01/15/11 02/14/11 1 | 0.50 CR |
| Subtotal | | \$0.00 |

* = PRORATED

98. In compliance with the Florida False Claims Act, PRS has submitted evidence to the Florida Attorney General prior to the filing of this Complaint as part of his Relator's Disclosure demonstrating the Defendants' failure to bill, collect, and remit E911 Fees. Included within the Relator's Disclosure are examples of other Windstream bills where the Defendants have under-billed and under-remitted E911 Fees.³

G. PRS's Analysis of Other Data Confirms Windstream's Practice of Under-Billing E911 Fees

99. As discussed above, the Act does not call for an E911 Fee to be assessed on every single active telephone number. Therefore, the number of E911 Fees that should be billed each month to a particular customer can be less than the active telephone numbers provided to the customer by the Defendants. Likewise, caps and other attributes of the Act mean that not all of the active telephone numbers assigned to the Defendants should be billed an E911 Fee each month.

100. Based upon the particular attributes of the Act and Florida population and employment statistics, PRS has determined that, for Florida, Windstream and other providers should be billing and remitting monthly E911 Fees on approximately 50% of their active telephone numbers. In other states which have fewer caps and exemptions on the assessment of E911 Fees, the amount of the discount would be much less.

101. Applying the 50% discount applicable to Florida, the Defendants should be billing, collecting and remitting approximately 493,510 E911 Fees each month. They are, in fact, billing, collecting and remitting much fewer.

102. Based on PRS's investigation and analysis, the total estimated annual underpayment of E911 Fees to Florida by the Defendants for wireline service is \$760,777.

³ PRS has submitted this additional evidence to the Florida Attorney General.

103. The Defendants' customer agreements, tariffs, other printed materials and websites demonstrate Defendants' knowledge of their obligations to charge and collect E911 Fees from their customers. Defendants have nevertheless intentionally and/or knowingly failed to do so.

H. Windstream Violates the Florida False Claims Act

104. The Defendants conceal their actions by knowingly misrepresenting the amount of E911 Fees owed to Florida's E911 Board.

105. The Defendants have knowingly submitted and continue to submit monthly invoices to customers that under-state the amount of E911 Fees owed to the State of Florida under the Act. Therefore, each customer invoice constitutes a "false claim." *See* § 68.082(2)(g), Fla. Stat. (2015).

106. The Defendants have also submitted and continue to submit false monthly remittance reports to the State of Florida along with their payment of E911 Fees. In those remittance reports, the Defendants certify that the "amounts are submitted in compliance with Florida Statutes 365.171, 365.173, and 365.174 along with the ordinances and definitions held within." The remittance reports are certified as true, "under the penalties of perjury." These reports are false because the Defendants understate the number of "Total Subscribers" and because the number of E911 Fees billed and remitted are less than required by the Act. Therefore, the amounts submitted are not "in compliance with" the statutes, and each monthly remittance report constitutes a "false claim."

107. While Defendants' remittance reports may accurately represent the amount of E911 Fees actually collected from customers, the remittance reports misrepresent the "Total Subscribers" and, thus, the number of "service identifiers . . . subject to the E911 fee." They also

falsely state that the remittances are “in compliance with Florida Statutes 365.171, 365.173, and 365.174 along with the ordinances and definitions held within.”

108. In violation of the Florida False Claims Act, Defendants’ intentional and unlawful actions have resulted in there being substantially less E911 Fee revenue remitted to Florida than required by the Act. Defendants’ failure to comply with the Act deprives Florida of funds critical to maintaining and enhancing its 911 systems.

109. Each of Defendants’ customer invoices and false and fraudulent remittance reports was material to the Defendants’ obligations to pay the correct amount of E911 Fees for the monthly period in question.

110. Each of Defendants’ customer invoices and E911 Fee remittance reports concealed the under-charging and under-remittance of E911 Fees in an attempt to mislead the state into believing that it was receiving all E911 Fees owed.

111. Defendants’ illegal actions are ongoing and in violation of the Florida False Claims Act. If not forced to cease their practice of under-billing and under-remitting E911 Fees and filing false remittance reports with the State of Florida, the Defendants will continue to unlawfully deprive the state of critical resources.

CLAIM FOR RELIEF -- THE FLORIDA FALSE CLAIMS ACT

112. The allegations of all paragraphs in this Complaint are incorporated herein by reference.

113. PRS brings this action on behalf of the State of Florida pursuant to the *qui tam* provisions of the Florida False Claims Act, § 68.083(2), Fla. Stat. (2015) seeking, among other things: (a) a declaration that Defendants’ practices and conduct have violated the Florida False Claims Act; (b) treble damages for the millions of dollars in lost E911 Fees owed to the State; (c) civil penalties; (d) an injunction; (e) an accounting relating to the Defendants’ billing, collection,

and remittance of E911 Fees; and (f) an award to the Plaintiff from the proceeds of any recovery, plus reasonable expenses, attorneys' fees, and costs pursuant to §68.085, Fla. Stat. (2015).

114. As voice communications service providers, the Defendants are charged with the duty of billing and collecting the correct and proper amount of E911 Fees from each of their customers and then remitting the correct and proper amounts to the E911 Board and the State of Florida.

115. As set forth in the preceding paragraphs, the Defendants have knowingly failed to bill and collect the correct amount of E911 Fees to their customers in Florida. Instead, they have purposefully under-billed and under-collected E911 Fees as set forth herein.

116. The Defendants have also knowingly and intentionally submitted monthly E911 Fee remittance forms to the State of Florida that falsely reflect the amount of E911 Fees owed to the state under the Act. The remittance reports falsely represent that the Defendants have billed, collected, and remitted all of the E911 Fees required by the Act when, in fact, the Defendants have purposefully and knowingly under-billed and under-remitted E911 Fees to the state.

117. The Defendants have knowingly and intentionally committed the following actions, and continue to commit the following actions, which constitute false claims under §§ 68.081, *et seq.*, Fla. Stat. (2015), for which the Defendants are liable to the State of Florida:

- (a) submitting monthly E911 Fee remittance reports to the State of Florida that are false in that they contain a certification, under penalty of perjury, that the amounts remitted are in compliance with Florida Statutes §§ 365.171, 365.172, 365.173, and 365.174 when, in fact, remittances are less than required by the Act;

- (b) knowingly submitting monthly invoices to customers that under-state the amount of E911 Fees owed to the State of Florida under the Act;
- (c) controlling money to be used by the State, in that the Defendants have the right and obligation to bill and collect E911 Fees from their customers as required by the Act, and knowingly billing, collecting, and remitting less than all of that money;
- (d) being authorized and required by the Act to deliver monthly remittance reports to the State of Florida certifying receipt of E911 Fees to be used by the State and, with the intent to defraud the State, delivering the remittance forms without knowing that the information on the forms is true;
- (e) knowingly making and/or using false records in the form of monthly customer invoices that under-state the amount of E911 Fees due and monthly remittance reports that are material to the Defendants' obligation to transmit money to the State and improperly decreasing the obligation to transmit money to the State; and
- (f) conspiring with each other to commit the violations described herein.

118. The Defendants' misconduct has damaged and continues to damage the State of Florida by depriving the State of critical resources with which to fund its life-saving, emergency services.

119. Under §§ 68.081, *et seq.*, Fla. Stat. (2015), the Defendants are liable for a civil penalty of not less than \$5,500 and not more than \$11,000 for every false remittance form submitted to the State and for treble the amount of damages sustained by the State because of the Defendants' actions.

PRAYER FOR RELIEF

Plaintiff PRS, on behalf of itself and the State of Florida, prays as follows:

1. That for violations of the Florida False Claims Act, §§ 68.081, *et seq.*, Fla. Stat. (2015), this Court enter Judgment against the Defendants in an amount equal to three times the amount of damages that Florida has sustained because of Defendants' actions, plus a civil penalty of \$11,000 for each action in violation of the Florida False Claims Act, plus reasonable expenses, attorneys' fees and the costs of this action, with interest, including the costs to the State of Florida;
2. That the Defendants be enjoined from continuing their practice of under-billing and under-remitting E911 Fees and submitting false remittance statements to the State of Florida;
3. That, in the event the State of Florida decides to proceed with this action, Plaintiff PRS be awarded an amount that the Court decides is reasonable for collecting the civil penalty and damages in the amount of 25% of the proceeds of the action or settlement of the claim, or the maximum allowed under applicable law;
4. That, in the event that the State of Florida does not proceed with this action, Plaintiff PRS be awarded an amount that the Court decides is reasonable for collecting the civil penalty and damages in the amount of 30% of the proceeds of the action or the settlement, or the maximum allowed under applicable law;
5. That Plaintiff PRS be awarded all costs of this action, together with all expert witness fees, other expenses, attorneys' fees, and court costs, as fully as is allowed by law;
6. That a trial by jury be held on all issues; and

7. That the State of Florida, and Plaintiff PRS, further receive all relief, both in law and in equity, to which they may reasonably appear entitled.

Counsel for Plaintiff Phone Recovery
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on February 22nd, 2018, I electronically filed the foregoing with the Clerk of the Court through Florida Court's E-Filing Portal (www.myflcouraccess.com), by using the E-Service Option, which will send a Notice of Electronic Filing, in compliance with Florida Rules of Judicial Administration Rule 2.516, to all attorneys of record.

/s/ Brent Bigger

Exhibit 2

IN THE CIRCUIT COURT OF THE
SECOND JUDICIAL CIRCUIT IN AND
FOR LEON COUNTY, FLORIDA

STATE OF FLORIDA *ex rel.* PHONE
RECOVERY SERVICES, LLC,

Plaintiffs,

v.

WINDSTREAM COMMUNICATIONS, LLC *et*
al.,

Defendants.

Case No. 2016 CA 002103

**THE ATTORNEY GENERAL’S MOTION TO INTERVENE AND FOR ENTRY OF AN
ORDER DETERMINING THAT THERE IS NO APPLICABLE BANKRUPTCY STAY**

The State of Florida, by and through the Department of Legal Affairs, Office of the Attorney General (the “Attorney General”), hereby respectfully requests that the Court enter an Order: (1) allowing the State to intervene and take over this matter pursuant to Fla. Stat. § 68.084(3); and, (2) then determining that any claimed automatic stay pursuant to 11 U.S.C. § 362 does not apply based on the State’s intervention and continued prosecution of the claims asserted on its behalf in this matter. The Attorney General states in support thereof as follows:

A. Background and Procedural Posture

Relator filed this case pursuant to the Florida False Claims Act, §§ 68.081 *et seq.*, Fla. Stat. (2016). The Attorney General filed a notice of non-intervention and request for continued service of papers on September 21, 2016. That pleading noted “the State of Florida remains the real party in interest and the Department reserves its right to, *inter alia*, seek to intervene and take over the action at a later date if appropriate.” See Barati v. State, 198 So. 3d 69, 81 (Fla. 1st DCA 2016) (“Under the Florida FCA, the Attorney General is [always] the real party in interest ...”).

In the two and one-half years since the Department's declination, the Court denied defendants' motion to dismiss, and, thereafter, relator and defendants engaged in limited document production in the consolidated cases, although the Windstream defendants produced more information than many other defendants.

On May 17, 2018, Judge Shelfer stayed this action, based on a promised declaratory ruling from the Federal Communications Commission in a proceeding referred to the Commission by the United States District Court for the Northern District of Alabama (the "FCC Stay Order"). Even though it has been over one year since the entry of the initial FCC Stay Order, the Commission has still not issued any declaration or ruling, and there is no indication if or when it will do so. These defendants chose not to move to extend the stay, so it has clearly expired as to them.

On March 11, 2019, these defendants filed a Suggestion of Bankruptcy and Notice of the Automatic Stay based upon a voluntary Chapter 11 proceeding they filed in the United States Bankruptcy Court for the Southern District of New York. The Attorney General would note, however, that the State of Florida has not received any official notice of the bankruptcy proceeding.

B. Intervention by the State is Appropriate

Under the Florida False Claims Act, where the Department initially declines intervention and relator then proceeds with the action, the Court may "permit the department to intervene and take over the action on behalf of the state at a later date upon showing of good cause." § 68.084(3), Fla. Stat. (2016). Although the lengthy pendency of the motion to dismiss and the subsequent FCC Stay Order have caused discovery to be quite limited, the Attorney General has become aware of material, new information that provides "good cause" to justify its intervention at this time.

Generally speaking, the Complaint alleges that defendants billed fewer than the required number of 911 fees to wireline business telephone customers in Florida in violation of Florida's

911 statute, §§ 365.171 *et seq.*, Fla. Stat. (2016). Defendants then submitted false or fraudulent E911 System Remittance Reports to the State each month that concealed their practice of under-billing and under-remitting 911 fees. The Complaint further alleges that this practice has caused the State to lose critical funding for 911 emergency services based upon the Remittance Reports.

At this point, many document requests remain outstanding. Even with the limited production, however, there is a group of “documents” produced by defendants that clearly substantiate some of the Complaint’s important allegations. Specifically, the Complaint alleges:

The Defendants have also submitted and continue to submit false monthly remittance reports to the State of Florida along with their payment of E911 Fees. In those remittance reports, the Defendants certify that the “amounts are submitted in compliance with Florida Statutes 365.171, 365.173, and 365.174 along with the ordinances and definitions held within.” The remittance reports are certified as true, “under the penalties of perjury.” *These reports are false because the Defendants understate the number of “Total Subscribers” and because the number of E911 Fees billed and remitted are less than required by the Act. Therefore, the amounts submitted are not “in compliance with” the statutes, and each monthly remittance report constitutes a “false claim.” While Defendants’ remittance reports may accurately represent the amount of E911 Fees actually collected from customers, the remittance reports misrepresent the “Total Subscribers” and, thus, the number of “service identifiers . . . subject to the E911 fee.”* They also falsely state that the remittances are “in compliance with Florida Statutes 365.171, 365.173, and 365.174 along with the ordinances and definitions held within.”

Rel.’s Compl. ¶¶ 101–102 (*italics added*). Undersigned counsel’s review of certain documents produced by Defendants since the filing of the declination notice substantiates these allegations.

Before describing these discovery materials, it is important to know that DMS publishes Excel spreadsheets for voice service providers to use as the forms for their monthly 911 Remittance Reports.¹ The form for use by VoIP providers appears as follows:²

1

https://www.dms.myflorida.com/business_operations/telecommunications/state_of_florida_911/service_providers_information.

² The Department of Management Services publishes a slightly different Excel form for non-VoIP wireline providers (referred to as local exchange carriers), but it contains no material differences with respect to the issues in this matter.

| FLORIDA EMERGENCY COMMUNICATIONS NUMBER E911 SYSTEM REMITTANCE REPORT | | | | | | | | | |
|--|-------------------|------------------------|--------------------|-------------|----------------------|---|-----------------------|--------------------|-------------|
| NON-WIRELESS E911 PROVIDER CATEGORY | | | | | | | | | |
| Remit to: Florida Department of Management Services Post Office Box 7117 Tallahassee, Florida 32314 | | | | | | VoIP Provider Name: Street Address: City, State, Zip: Contact Person: Contact Phone #: E-mail Address: | | | |
| Report Date: | | Period of Collections: | | | | to | | | |
| COUNTY | Total Subscribers | Rate | Billing Adjustment | Uncollected | Gross Fees Collected | 1% Provider Allowance | Additional Adjustment | Net Fees Collected | Comment (1) |
| Alachua | 0 | 0.40 | - | - | - | - | - | - | |
| Baker | 0 | 0.40 | - | - | - | - | - | - | |
| Bay | 0 | 0.40 | - | - | - | - | - | - | |
| Bradford | 0 | 0.40 | - | - | - | - | - | - | |
| Brevard | 0 | 0.40 | - | - | - | - | - | - | |
| Broward | 0 | 0.40 | - | - | - | - | - | - | |
| Calhoun | 0 | 0.40 | - | - | - | - | - | - | |
| Charlotte | 0 | 0.40 | - | - | - | - | - | - | |
| Citrus | 0 | 0.40 | - | - | - | - | - | - | |
| Clay | 0 | 0.40 | - | - | - | - | - | - | |
| Collier | 0 | 0.40 | - | - | - | - | - | - | |
| Columbia | 0 | 0.40 | - | - | - | - | - | - | |
| Desoto | 0 | 0.40 | - | - | - | - | - | - | |
| Dixie | 0 | 0.40 | - | - | - | - | - | - | |
| Duval | 0 | 0.40 | - | - | - | - | - | - | |
| Escambia | 0 | 0.40 | - | - | - | - | - | - | |
| Flagler | 0 | 0.40 | - | - | - | - | - | - | |
| Franklin | 0 | 0.40 | - | - | - | - | - | - | |
| Gadsden | 0 | 0.40 | - | - | - | - | - | - | |
| Gilchrist | 0 | 0.40 | - | - | - | - | - | - | |
| Glades | 0 | 0.40 | - | - | - | - | - | - | |
| Gulf | 0 | 0.40 | - | - | - | - | - | - | |
| Hamilton | 0 | 0.40 | - | - | - | - | - | - | |
| Hardee | 0 | 0.40 | - | - | - | - | - | - | |
| Hendry | 0 | 0.40 | - | - | - | - | - | - | |
| Hernando | 0 | 0.40 | - | - | - | - | - | - | |
| Highlands | 0 | 0.40 | - | - | - | - | - | - | |
| Hillsborough | 0 | 0.40 | - | - | - | - | - | - | |
| Holmes | 0 | 0.40 | - | - | - | - | - | - | |
| Indian River | 0 | 0.40 | - | - | - | - | - | - | |
| Jackson | 0 | 0.40 | - | - | - | - | - | - | |
| Jefferson | 0 | 0.40 | - | - | - | - | - | - | |
| Lafayette | 0 | 0.40 | - | - | - | - | - | - | |
| Lake | 0 | 0.40 | - | - | - | - | - | - | |
| Lee | 0 | 0.40 | - | - | - | - | - | - | |
| Leon | 0 | 0.40 | - | - | - | - | - | - | |
| Levy | 0 | 0.40 | - | - | - | - | - | - | |
| Liberty | 0 | 0.40 | - | - | - | - | - | - | |
| Madison | 0 | 0.40 | - | - | - | - | - | - | |
| Manatee | 0 | 0.40 | - | - | - | - | - | - | |
| Marion | 0 | 0.40 | - | - | - | - | - | - | |
| Martin | 0 | 0.40 | - | - | - | - | - | - | |
| Miami-Dade | 0 | 0.40 | - | - | - | - | - | - | |
| Monroe | 0 | 0.40 | - | - | - | - | - | - | |
| Nassau | 0 | 0.40 | - | - | - | - | - | - | |
| Okaloosa | 0 | 0.40 | - | - | - | - | - | - | |
| Okeechobee | 0 | 0.40 | - | - | - | - | - | - | |
| Orange | 0 | 0.40 | - | - | - | - | - | - | |
| Osceola | 0 | 0.40 | - | - | - | - | - | - | |
| Palm Beach | 0 | 0.40 | - | - | - | - | - | - | |
| Pasco | 0 | 0.40 | - | - | - | - | - | - | |
| Pinellas | 0 | 0.40 | - | - | - | - | - | - | |
| Polk | 0 | 0.40 | - | - | - | - | - | - | |
| Putnam | 0 | 0.40 | - | - | - | - | - | - | |
| Santa Rosa | 0 | 0.40 | - | - | - | - | - | - | |
| Sarasota | 0 | 0.40 | - | - | - | - | - | - | |
| Seminole | 0 | 0.40 | - | - | - | - | - | - | |
| St. Johns | 0 | 0.40 | - | - | - | - | - | - | |
| St. Lucie | 0 | 0.40 | - | - | - | - | - | - | |
| Sumter | 0 | 0.40 | - | - | - | - | - | - | |
| Suwannee | 0 | 0.40 | - | - | - | - | - | - | |
| Taylor | 0 | 0.40 | - | - | - | - | - | - | |
| Union | 0 | 0.40 | - | - | - | - | - | - | |
| Volusia | 0 | 0.40 | - | - | - | - | - | - | |
| Wakulla | 0 | 0.40 | - | - | - | - | - | - | |
| Walton | 0 | 0.40 | - | - | - | - | - | - | |
| Washington | 0 | 0.40 | - | - | - | - | - | - | |
| TOTALS | - | | \$ - | \$ - | \$ - | \$ - | \$ - | \$ - | |
| Check Amount: | | Check Date: | | | | Check Number: | | | |
| These amounts are submitted in compliance with Florida Statutes 365.171, 365.172, 365.173 and 365.174 along with ordinances and definitions held within. | | | | | | | | | |
| Under penalties of perjury, I declare that I have verified the foregoing and the amounts alleged are true, to the best of my knowledge and belief. | | | | | | | | | |
| Signature / Title | | | | | | Revised Form Date 1/1/2015 | | | |
| (1) Description of any adjustment or other pertinent notation. | | | | | | *** Local Exchange Subscribers on Service Provider Basis | | | |

In addition to providing this form for use by the voice service providers, DMS publishes instructions on how to complete the form in compliance with Fla. Stat. §§ 365.171 *et seq.* In fact, the Florida Administrative Code sets forth a detailed rule governing the contents of the 911 Remittance Reports. See Fla. Admin. Code R. 60FF1-5.004, Requirements for Fee Remittance Submitted by or on Behalf of Wireless and Non-Wireless Service Providers (the “FL 911 Fee Remittance Rule”). This rule contains provisions that are critical for this case. It instructs, in part:

(b) All service providers providing fee remittance for 911 or E911 service disbursements pursuant to Section 365.172(8)(f), F.S., shall provide the following information with the fee remittance. The information shall be provided in the appropriate categories, either the wireless, non-wireless LEC, non-wireless VoIP or non-wireless Specialty categories. ***This information shall be provided in a form format referred to as a Florida Emergency Communications Number E911 System Remittance Report. The form shall include: ...***

4. Itemization of fee remittance revenue per county, including:
 - a. County; (if the county information is not available, the remittance should include a statement from the service provider that the county location information is not available)
 - b. ***Total Subscribers; each provider shall report the number of service identifiers for subscribers, or access lines billed based on the county;***
 - c. ***Gross Fees Collected;***
 - d. 1% Provider Allowance;
 - e. Additional Adjustment;
 - f. Billing Adjustment;
 - g. Uncollected;
 - h. Comment or description of any adjustment or other pertinent notation; and
 - i. Net Fees Collected.
5. Remittance Check Amount, Check Date, and Check Number; and
6. The following certification shall be a part of the form: These amounts are submitted in compliance with Sections 365.172, 365.173 and 365.174, F.S., along with ordinances and definitions held within. Under penalties of perjury, I declare that I have verified the foregoing and the amounts alleged are true, to the best of my knowledge and belief.

(c) Fee Remittance Definitions:

1. ***Total Subscribers: The number of billed service-identifiers, as described in Section 365.172(8), F.S., subject to the E911 fee.*** (Item (2)(b)4.b.)
2. ***Gross Fees Collected: A calculated quantity equal to the product of the “subscribers” and the E911 fee, plus any “billing adjustment,” minus the “uncollected.”*** (Item (2)(b)4.c.)

Fla. Admin. Code R. 60FF1-5.004(b) (emphasis added).

As the Complaint makes clear, this FL 911 Fee Remittance Rule unequivocally explains that the “Gross Fees Collected” should be calculated by multiplying the “total subscribers” (defined as billed service identifiers) by the 911 fee rate (which was \$.50 and is now \$.40). Per the Complaint, this requirement is further emphasized through published instructions to voice service providers which state: “The gross fees collected (locked) are automatically calculated based on the number of subscribers then multiplied by the monthly fee rate (locked).”³

Certain documents produced by these defendants subsequent to the non-intervention notice reveal that they have violated these requirements and, as alleged in the Complaint, falsely reported the number of “total subscribers.” More specifically, these defendants produced 911 fee remittance “workbook” spreadsheets for many months.⁴ The “workbooks” show how these defendants calculate the number of “total subscribers” that they reported to the State on their 911 Remittance Reports. Instead of reporting the “number of billed service-identifiers” as required by Florida law, defendants contrived their subscriber counts by dividing the amount of 911 fees they planned to remit by the 911 fee rate. In other words, they “backed-into” their subscriber counts to make it appear as though they billed and collected 911 fees on every single one of them. Florida law, however, requires just the opposite—the starting point should be the number of subscribers or billed service identifiers.

To put this practice in perspective, it would be equivalent to an individual deciding how

³ https://www.dms.myflorida.com/content/download/114538/633389/Fee_Remittance_Information_revised_2-19-15.pdf.

⁴ Defendants have produced these 911 fee remittance workbooks in Excel format for every month from January 2010 through July 2017. They have not been attached here both because they are marked as confidential and are exceptionally long and difficult to navigate if not in their native format. The Attorney General will be happy to provide the full workbook materials to the Court in electronic form upon its request.

much he or she wanted to pay in taxes and then reporting income to the IRS by dividing the taxes he or she chose to remit by the applicable tax rate. It would always appear as though the taxpayer was paying taxes on all income when, in reality, the actual total income was never reported.

Not only do defendants' 911 fee remittance workbooks plainly reveal how they violate Florida law in the preparation and reporting on their 911 Remittance Reports, but this practice also allows defendants to conceal under-billing and under-remittance of 911 fees to the State. By backing-into their reported "total subscribers," defendants make it appear as though they are remitting 911 fees on every service identifier (i.e., telephone number or line). In reality, however, defendants never report the true total number of subscribers. Therefore, there is no way for the State to detect if the 911 fee remittances are less than they should be. Defendants' practice also prevents the State from having accurate information about the actual volume of subscribers or telephone numbers that defendants have active in Florida. The workbooks, therefore, demonstrate a systematic fraudulent practice by defendants to submit false reports to the State.

In summary, the Attorney General has now reviewed documents which were not available at the time of her initial declination, but which thoroughly corroborate critical allegations in the Complaint and accordingly constitute "good cause" to support the State's intervention at this time.

C. This Court has jurisdiction to determine the applicability of the bankruptcy stay and under well-established precedent it should find that the stay does not apply to an intervened Florida False Claims Act matter

Based on its decision on the motion to intervene, the Attorney General further requests that the Court enter an Order finding that the bankruptcy stay does not apply to this matter upon intervention. The majority rule is "[t]he court in which the litigation claimed to be stayed is pending has jurisdiction to determine not only its own jurisdiction but also the more precise question whether the proceeding pending before it is subject to the automatic stay." N.L.R.B. v.

Edward Cooper Painting, Inc., 804 F. 2d 934, 939 (6th Cir. 1986) (*quoting In re Baldwin–United Corp. Litig.*, 765 F. 2d 343, 347 (2d Cir. 1985)). This means that state courts have concurrent jurisdiction in determining the applicability of an automatic stay under section 362(a) of the Bankruptcy Code. *See In re Siskin*, 258 B.R. 554, 563 (Bankr. E.D.N.Y. 2001); *see also In re Glass*, 240 B.R. 782, 787 (Bankr. M.D. Fla. 1999).⁵

Upon the filing of a bankruptcy proceeding, the debtor, as a general matter, receives an automatic stay from the bankruptcy court that, in effect, stops all collection activities by creditors and thus preserves the debtor’s status quo. As 11 U.S.C. § 362(a) makes clear:

Except as provided in subsection (b) of this section, a petition filed under section 301, 302, or 303 of this title . . . operates as a stay, applicable to all entities, of . . . the commencement or continuation, including the issuance or employment of process, of a judicial, administrative, or other action or proceeding against the debtor that was or could have been commenced before the commencement of the case under this title, or to recover a claim against the debtor that arose before the commencement of the case under this title.

11 U.S.C. § 362(a)(1) (italics added). But as this rule notes, it is subject to the exceptions provided in subsection (b). Germane to this case, the Bankruptcy Code specifically excepts:

The filing of a petition under section 301, 302, or 303 of this title, or of an application under section 5(a)(3) of the Securities Investor Protection Act of 1970, does not operate as a stay . . . of the commencement or continuation of an action or proceeding by a governmental unit or any organization exercising authority . . . to enforce such governmental unit’s or organization’s police and regulatory power.

11 U.S.C. § 362(b)(4).

In other words, “an action by a governmental unit to enforce its police and regulatory powers is excepted from the automatic stay so long as the action is not to enforce a money judgment.” In re Mohawk Greenfield Motel Corp., 239 B.R. 1, 5–6 (Bankr. D. Mass. 1999). This

⁵ Importantly, both jurisdictions involved in this case (this Court, here in Florida, and the Southern District of New York, where the bankruptcy proceeding was filed) have endorsed this concurrent jurisdiction model.

exception ensures that the bankruptcy system does not become a haven for “debtors improperly seeking refuge under the stay in an effort to frustrate necessary government functions.” United States v. Nicolet, 857 F.2d 202, 207 (3d Cir. 1988).

This Court can and should decide that the automatic stay does not apply here. First, on the jurisdictional question, a governmental unit that believes its proceedings are a valid exercise of its police and regulatory powers under § 362(b)(4), and thus excepted from an automatic stay, “is not required to petition the bankruptcy court for relief from the automatic stay prior to continuing its proceeding.” In re Siskin, 258 B.R. 554, 563 (Bankr. E.D.N.Y. 2001); In re Glass, 240 B.R. 782, 787 (Bankr. M.D. Fla. 1999). Here, the Attorney General respectfully submits that this matter, upon intervention, is excepted from § 362(a) because she is seeking to enforce the State’s police and regulatory powers by punishing and deterring acts of fraud committed by these defendants in violation of Florida’s False Claims Act. The State is already the real party in interest in this declined matter and her intervention would merely be “a continuation” of the matter. Therefore, this Court clearly has jurisdiction to determine the applicability of the automatic stay here.

Moreover, this Court should determine on the merits that no stay applies after the Attorney General is allowed to intervene. To determine whether Section 362(b)(4) applies, the courts have developed two tests: “the pecuniary purpose” and the “public policy” tests. In re Com. Oil Co., 847 F.2d 291, 294 (6th Cir. 1988). The focus of the pecuniary purpose test rests on whether the governmental action relates primarily to the protection of the government’s pecuniary interest in the debtor’s property (stayed) or to matters of public safety and welfare (not stayed). In re Dunbar, 235 B.R. 465, 471 (Bankr. App. 9th Cir. 1999), aff’d, 245 F.3d 1058 (9th Cir. 2001). The public policy test “distinguishes between proceedings that effectuate public policy and those that

adjudicate private rights—only the former are exempted from the automatic stay.” In re Herr, 28 B.R. 465, 468 (Bankr. D. Me. 1983).

Courts have repeatedly held that intervened federal False Claims Act (“FCA”) cases fall squarely within the express section 362(b)(4) exception to the automatic stay. In one similar case, the federal government sought to enforce violations of the FCA against debtors who had filed for Chapter 11 bankruptcy. In re Cmmw. Companies, Inc., 913 F. 2d 518, 520 (8th Cir. 1990). In reversing the lower court’s rulings that the automatic stay applied to the federal government’s FCA claim, the Eighth Circuit found that the continuation of the FCA claim served to inflict the sting of punishment on the defendant and also deter fraud against the government, which is within its regulatory and police powers. Id. at 528. While the end result of an FCA claim is meant, in part, to make the government whole for its monetary losses (a pecuniary interest), that fact does not outweigh the government’s interest in punishing and deterring acts of fraud. Id. The United States Supreme Court has also provided some additional guidance, as the Court has “made a point of noting that ‘for the defendant even remedial sanctions carry the sting of punishment.’” Id. (*quoting* U.S. v. Halper, 490 U.S. 435, 447 (1989), *abrogated by* Hudson v. U.S., 522 U.S. 93 (1997); *see also* U. S. v. Bornstein, 423 U.S. 303, 310 (1976) (noting that the FCA was adopted for the purpose of punishing and preventing frauds).

Here, the State’s interest in enforcing its police and regulatory powers outweighs any pecuniary interest that will ultimately come to bear after a monetary judgment under the Florida FCA.⁶ In other words, while the State is seeking the entry of a money judgment against these

⁶ The Federal and Florida False Claims Act, under 31 U.S.C. § 3729 and Fla. Stat. § 68.082 respectively, both seek to protect the government from the receipt of false or fraudulent payments. *See, e.g., Barati v. State*, 198 So. 3d 69, 71 (Fla. 1st DCA 2016) (noting that both the Federal and Florida False Claims Acts are “very similar”).

defendants for their violations of the Florida FCA, any such judgment would only fix the amount of the unsecured claim. See, e.g., In re Commonwealth Companies, Inc., 913 F. 2d at 520. Therefore, the State's Florida FCA claims against these defendants are excepted under section 362(b)(4) given the primary statutory purpose of punishing and deterring acts of fraud against it.

Conclusion

Based on the foregoing, the Attorney General respectfully requests that the Court enter an Order: (1) allowing the State to intervene and take over this action pursuant to Fla. Stat. § 68.084(3); and, (2) determining that any automatic stay pursuant to 11 U.S.C. § 362 does not apply based on the State's intervention and continued prosecution of the claims asserted on its behalf in this matter.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the undersigned electronically filed the foregoing with the Clerk of the Courts on June 7, 2019, by using the ECF system, which will send a notice of electronic filing to all counsel of record.

/s/ Russell S. Kent
Russell S. Kent