

Return date: December 18, 2019,  
at 10:00 a.m. ET  
Time for service of responsive  
papers: December 16, 2019

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

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IN RE:

WINDSTREAM HOLDINGS, INC., *et al.*,  
Debtors.

)  
) Chapter 11  
)

) Case No. 19-22312 (RDD)  
) (Jointly Administered)  
)

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**NOTICE OF HEARING ON MOTION BY NIAGARA MOHAWK POWER  
CORPORATION, PURSUANT TO 11 U.S.C. § 362(d) AND BANKRUPTCY  
RULE 4001, FOR RELIEF FROM THE AUTOMATIC STAY AND  
WAIVER OF THE STAY IMPOSED BY BANKRUPTCY RULE 4001(a)(3)**

**PLEASE TAKE NOTICE**, that upon the annexed motion (the “Motion”), Niagara  
Mohawk Power Corporation (“NIMO”), through its undersigned attorneys, will move this Court,



before The Honorable Robert D. Drain, United States Bankruptcy Judge, at the United States Bankruptcy Court for the Southern District of New York, 300 Quarropas Street, White Plains, New York 10601, on **December 18, 2019, at 10:00 a.m. prevailing Eastern Time**, or as soon thereafter as counsel may be heard, for the entry of an order pursuant to 11 U.S.C. § 362(d)(1) and Bankruptcy Rule 4001, for an order terminating or modifying the automatic stay imposed pursuant to 11 U.S.C. § 362, in the above-entitled cases, and in connection therewith, waiving the fourteen (14) day stay imposed by Fed. R. Bankr. P. 4001(a)(3), pursuant to the proposed order (the “Order”) annexed to the Motion, together with such other and further relief as is just, proper and equitable under the circumstances.

**PLEASE TAKE FURTHER NOTICE**, that responses or objections, if any, to the relief requested in the Motion shall: (a) be made in writing; (b) conform to the Federal Rules of Bankruptcy Procedure, the Local Bankruptcy Rules for the Southern District of New York, all General Orders applicable to Chapter 11 Cases in the United States Bankruptcy Court for the Southern District of New York, and the *Final Order Establishing Certain Notice, Case Management and Administrative Procedures* [Docket 392] (the “Case Management Order”) approved by the Bankruptcy Court; and be filed electronically with the Bankruptcy Court on the docket of *In re Windstream Holdings, Inc.*, Case 22312 (RDD) by registered users of the Court’s Electronic Case Filing System and in accordance with General Order M-399 (which is available on the Bankruptcy Court’s website, at <http://nysb.uscourts.gov>) (login and password required) with a paper copy delivered directly to Chambers and to the Office of the U.S. Trustee; and (d) be served so as to be actually received by **December 16, 2019, at 4:00 p.m. prevailing Eastern Time**, by (i) Barclay Damon LLP, Attn: Jon P. Devendorf, Esq. and J. Eric Charlton, Esq., 125 East Jefferson Street, Syracuse, New York 13202, (ii) Law Firm of Russell R. Johnson III,

PLC, Attn: Russell R. Johnson III, Esq., 2258 Wheatlands Drive, Manakin-Sabot, Virginia 23103, (iii) the entities on the Master Service List (as defined in the Case Management order and available on the Debtors' case website at <http://www.kccllc.net/windstream>), and (iv) any person or entity with a particularized interest in the subject matter of the Motion.

**PLEASE TAKE FURTHER NOTICE** that if no Objections are timely filed and served with respect to the Motion, NIMO shall, on or after the Objection Deadline, submit to the Court an order substantially in the form annexed as **Exhibit A** to the Motion, which order the Court may enter with no further notice or opportunity to be heard.

**PLEASE TAKE FURTHER NOTICE** that the Hearing may be continued or adjourned thereafter from time to time without further notice other than an announcement of the adjourned date or dates at the Hearing.

**PLEASE TAKE FURTHER NOTICE** that a copy of the Motion may be obtained free of charge by visiting the website of Kurtzman Carson Consultants LLC at <http://www.kccllc.net/windstream>. You may also obtain copies of any pleadings by visiting the Court's website at <http://www.nysb.uscourts.gov> in accordance with the procedures and fees set forth therein.

Dated: Syracuse, New York  
November 26, 2019

BARCLAY DAMON LLP

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

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

**MOTION BY NIAGARA MOHAWK POWER CORPORATION,  
PURSUANT TO 11 U.S.C. § 362(d) AND BANKRUPTCY RULE 4001,  
FOR RELIEF FROM THE AUTOMATIC STAY AND WAIVER  
OF THE STAY IMPOSED BY BANKRUPTCY RULE 4001(a)(3)**

Niagara Mohawk Power Corporation (“NIMO”), through its undersigned attorneys, hereby moves, pursuant to 11 U.S.C. § 362(d)(1) and Bankruptcy Rule 4001, for an order, *inter alia*:

A. terminating or modifying the automatic stay imposed pursuant to 11 U.S.C. § 362, in the above-captioned cases (“Chapter 11 Cases”): (i) to permit NIMO to request that the State Court (defined below) restore the State Court Litigation (defined below) to its docket; and (ii) to permit the State Court to proceed to rule on the parties’ fully-briefed summary judgment motions as submitted in the State Court Litigation, in order to liquidate the claims, if any, of NIMO against the debtors and debtors in possession in the Chapter 11 Cases (“Debtors”), with NIMO agreeing not to take any steps at this time to enforce any judgment entered in its favor; and (iii) permitting the parties to prosecute and/or otherwise participate in any appeal from such ruling by the State Court, before the New York State Supreme Court Appellate Division for the Fourth Judicial Department, and/or the New York State Court of Appeals (together, the “NY Appellate Courts”); and (iv) permitting the NY Appellate Court to rule on any such appeal (and/or motion in connection therewith) that may come before either of them; and

B. waiving the fourteen (14) day stay imposed by Fed. R. Bankr. P. 4001(a)(3).

### **JURISDICTION**

1. This Court has jurisdiction over this matter pursuant to 28 U.S.C. §§ 157 and 1334, 11 U.S.C. § 362(d), and Rules 4001(a) and 9014 of the Federal Rules of Bankruptcy Procedure and the *Amended Standing Order of Reference from the United States District Court for the Southern District of New York*, dated February 1, 2012.

2. Venue is proper pursuant to 28 U.S.C. §§ 1408 and 1409.
3. The basis for the relief requested herein is section 362(d)(1) of title 11 of the United States Code (the “Bankruptcy Code”).

### **FACTUAL BACKGROUND**

4. On February 25, 2019, each of the Debtors filed a petition for relief under Chapter 11 of the Bankruptcy Code commencing these Chapter 11 Cases.
5. Certain facts and circumstances describing the Chapter 11 Cases are set forth in the *Declaration of Tony Thomas, Chief Executive Officer and President of Windstream Holdings, Inc., (I) In Support of the Debtor’s Chapter 11 Petitions and First Day Motions and (II) Pursuant to Local Bankruptcy Rule 2007-2* [Dkt. No. 27] (the “First Day Declaration”) that was filed in this Court on February 25, 2019.
6. The Chapter 11 Cases have been consolidated for procedural purposes only and are being jointly administered pursuant to Bankruptcy Rule 1015(b).
7. The Debtors continue to operate their businesses and manage their property as debtors in possession pursuant to sections 1107(a) and 1108 of the Bankruptcy Code.
8. On March 12, 2019, the United States Trustee for the Southern District of New York appointed an official committee of creditors pursuant to section 1102 of the Bankruptcy Code [Dkt. No. 136].

### **State Court Lawsuit**

9. NIMO seeks an order of this Court modifying the automatic stay to permit its continued prosecution of a state court lawsuit (the “State Court Litigation”) that is currently pending in the New York State Supreme Court, Onondaga County (the “State

Court”) titled *Niagara Mohawk Power Corporation v. Windstream Communications, LLC f/k/a Windstream Communications, Inc.*, No. 2015EF4568 (Supreme Court, Onondaga County) (Karalunas, J.) for the limited purposes of (1) permitting NIMO to request that the State Court restore the State Court Litigation to the docket (as the case previously was marked off the State Court’s docket without prejudice, at the parties’ request, pending the parties’ settlement discussions), and (2) permitting the State Court to rule upon both parties’ fully-briefed summary judgment motions on the briefs and supporting documents as submitted; and (3) permitting the parties to prosecute and/or otherwise participate in any appeal from such ruling by the State Court, before the NY Appellate Court; and (4) permitting the NY Appellate Courts to rule on any such appeal (and/or motion in connection therewith) that may come before either of them.

10. The State Court Litigation was commenced on or about November 6, 2015 and has been pending for over four years.

11. The Complaint in the State Court Litigation alleges three state law causes of action (i.e., breach of contract, unjust enrichment, and *quantum meruit*) based on the Debtor’s alleged breaches of a contract entered into between the parties. In the State Court Litigation, NIMO attempts to recover unpaid charges in the amount of \$9,411,159.42 (together with late fees, interest, and legal fees and expenses) incurred by NIMO in connection with utilizing certain protective matting and other equipment, at the request and for the sole benefit of the Debtor, in connection with a rebuild project NIMO undertook on a segment of its underground transmission network located on real property in which NIMO holds a possessory ownership interest and sublets certain use and possessory rights to the Debtor pursuant to a Right of Occupancy Agreement Authorizing



Use of Certain Niagara Mohawk Rights-of-Way and an Addendum to Niagara Mohawk Right of Occupancy Agreement in Connection with the Sale of Telergy Assets.<sup>1</sup>

12. After the Debtor removed the controversy to the United States District Court for the Northern District of New York, and after that court remanded back to the State Court, , issue was joined in the State Court Litigation by service of an Answer, in which Debtor acknowledged being a party to the subject written agreement.<sup>2</sup> The Honorable Deborah H. Karalunas was assigned to the State Court Litigation in 2016 and since then has been the only judge assigned to the State Court Litigation. Judge Karalunas has become fully informed of the relevant facts and legal issues underlying the parties' dispute:

(a) CONFERENCES:

- (1) May 2, 2016 (in-person): Justice Karalunas held a preliminary conference in chambers regarding procedural matters and development of a case schedule.
- (2) December 12, 2017 (telephonic): Justice Karalunas held a conference to amend the case schedule in light of discovery status.
- (3) June 26, 2018 (in-person): Justice Karalunas held a settlement conference in chambers, attended by counsel and respective client representatives.

(b) MOTIONS:

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<sup>1</sup> See generally NIMO's Summons and Complaint, e-filed Nov. 6, 2015 (NYSCEF Doc. 1) (Devendorf Decl., Ex. 1).

<sup>2</sup> See generally Debtor's Answer, e-filed April 1, 2016 (NYSCEF Doc. 22) (Ex. 2) (Devendorf Decl., Ex. 2).

(1) Discovery Motion (return date April 12, 2017): Justice

Karalunas granted Debtor's motion to compel responses to certain requests for confidential information and documents concerning NIMO's relationship with a nonparty. Together, the parties' discovery motion papers consisted of two (2) memoranda of law, two (2) attorney affirmations, two (2) client affidavits, and twenty-three (23) documentary exhibits. Debtor's motion was granted-in-part and denied-in-part by Justice Karalunas, with NIMO's responses subject to redaction as necessary to preserve competitively sensitive information.

(2) Summary Judgment Motions (fully briefed and submitted

June 20, 2018): NIMO moved for summary judgment on its breach of contract claim, and Debtor separately moved for summary judgment of dismissal of the entirety of NIMO's Complaint. A ruling had not issued by the time the State Court Litigation was marked off the State Court's calendar for settlement purposes, on July 9, 2018. Deemed fully submitted as of June 20, 2018, the motion papers before Justice Karalunas consisted of (among other things) six (6) memoranda of law, three (3) attorney affirmations, one (1) party affidavit, eighty-five (85) documentary exhibits (including deposition transcripts and several oversized

maps of the property/facilities at issue), and one (1) report of Debtor's outside consultant.

13. Discovery in the State Court Litigation has been completed for over a year, and trial of the action was originally scheduled to begin on August 6, 2018. Prior to the scheduled trial, the parties filed competing summary judgment motions each seeking dispositive rulings in lieu of trial with respect to all issues in the case.<sup>3</sup> As of June 15, 2018 the summary judgment motions had been fully briefed, and Judge Karalunas indicated that she was prepared to rule on the summary judgment motions without the need for a hearing.

14. While the summary judgment motions were pending, and prior to any decision being rendered, the parties sought some additional time from the State Court to conduct settlement negotiations. Judge Karalunas obliged the parties' request and held the summary judgment motions in abeyance, and on July 9, 2018 Judge Karalunas marked the State Court Litigation off of her docket in order for settlement discussions to proceed, subject to restoration of the case to her docket within one year. The case may be restored to the State Court docket by a letter from counsel indicating that settlement discussions have not been successful and that the matter should be restored and the summary judgment motions decided (a "Restoration Request").

15. In May 2019, NIMO's counsel in the State Court Litigation sought consent from the Debtor's counsel in the State Court Litigation (the "Debtor's Litigation Counsel") to relief from the automatic stay in order to have the fully-briefed summary judgment motions set for a hearing and to have a trial date set so that the matter could

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<sup>3</sup> Debtor's Notice of Motion for Summary Judgment, e-filed May 25, 2018 (NYSCEF Doc. 110) (Ex. 3); NIMO's Notice of Motion for Summary Judgment, e-filed May 25, 2018 (NYSCEF Doc. 149) (Ex. 4).

proceed through final judgment, with NIMO agreeing not to take any action to enforce any judgment rendered in its favor. Debtor's Litigation Counsel denied NIMO's request. On or about May 29, 2019, Debtors' counsel in the Chapter 11 Cases ("Debtors' Bankruptcy Counsel") confirmed that the Debtor would not consent to an application to lift the automatic stay.

16. In light of recent rulings by this Court on other motions for relief from the automatic stay to proceed with litigation in this case, by email dated June 24, 2019 from NIMO's bankruptcy counsel to the Debtors' Bankruptcy Counsel, NIMO revised its request to a more limited lifting of the stay. Specifically, as the summary judgment motions have been fully briefed and Judge Karalunas has indicated that she is prepared to rule on those motions without the need for a hearing, NIMO inquired whether the Debtors would consent to relief from the automatic stay for the limited purpose of allowing the State Court to rule on the summary judgment motions as submitted. Debtors' Bankruptcy Counsel again responded that the Debtors would not consent to an application to lift the automatic stay.

17. Before the State Court agreed to the parties' request to stay further proceedings in the State Court Litigation pending settlement discussions, the State Court was primed to make a decision which would have liquidated the claims, if any, of NIMO against the Debtors in these bankruptcy proceedings.

18. Further, the only discussions that took place regarding settlement after Justice Karalunas marked the case off her docket pending settlement discussions was a brief email thread between counsel in August 2018 concerning looking into dates and names of persons to be involved in settlement discussions. There were almost no further

communications from Debtors' Litigation Counsel to NIMO's counsel between August 2018 and the Petition Date.

19. The factual predicate for this motion is more fully set forth in the Attorney Declaration of Jon P. Devendorf (the "Devendorf Declaration") and the exhibits thereto. Attorney Devendorf of Barclay Damon LLP, along with other counsel, represents NIMO in the State Court Litigation.

### **APPLICABLE LAW**

20. Pursuant to 11 U.S.C. § 362(d)(1), "the court shall grant relief from the stay provided under subsection (a) of this section, such as by terminating, annulling, modifying, or conditioning such stay...for cause."

21. In dealing with stay relief to continue non-bankruptcy litigation against the debtor, the United States Bankruptcy Court for the Southern District of New York has held as follows:

Neither section 362(d)(1) nor the legislative history defines "cause." "Cause" is an intentionally broad and flexible concept which must be determined on a case-by-case basis. Whether to lift the stay is in the bankruptcy court's discretion. Still, the legislative history of 362 reveals that Congress intended "that one of the factors to consider when determining whether to modify the stay is whether doing so would permit pending litigation involving the debtor to continue in a nonbankruptcy forum," as "[i]t will often be more appropriate to permit proceedings to continue in their place of origin, where no great prejudice to the bankruptcy estate would result, in order to leave the parties to their chosen forum and to relieve the bankruptcy court from duties that may be handled elsewhere."

*In re Project Orange Associates, LLC*, 432 B.R. 89, 103 (Bankr. S.D.N.Y. 2010)

(citations omitted).

22. In the instant case, substantial time, effort and costs have been expended in bringing the State Court Litigation to the eve of trial. Further, both parties have already completed all of the work necessary to fully brief the State Court on the issues presented in their dispositive summary judgment motions. The State Court has indicated that it is prepared to rule on those motions as submitted, without the need for a hearing, and those rulings may be dispositive of all issues in the litigation, liquidating the claims, if any, of NIMO against the Debtors.

23. Unlike cases where the non-bankruptcy litigation has been in its very early stages and substantial discovery has not been had, the State Court Litigation is in its later stages, and the State Court is poised to make a ruling that may be dispositive as to all issues in the case.

24. In a hearing on a motion for relief from the automatic stay under section 362(d), the party opposing the stay bears the burden of proof on all issues (except the debtor's equity in the property under Section 362(d)(2)(A)). *See* 11 U.S.C. § 362(g). However, "[i]f a creditor seeking relief from this stay makes a *prima facie* case of 'cause' for lifting the stay, the burden of going forward shifts to the debtor pursuant to section 362(g)." *In re 234-6 West 22<sup>nd</sup> St. Corp.*, 214 B.R. 751, 756 (Bankr. S.D.N.Y. 1997).

25. The Second Circuit has identified a "dozen factors to be weighed in deciding whether litigation should be permitted to continue in another forum":

- (1) whether relief would result in a partial or complete resolution of the issues;
- (2) lack of any connection with or interference with the bankruptcy case;
- (3) whether the other proceeding involves the debtor as a fiduciary;

- (4) whether a specialized tribunal with the necessary expertise has been established to hear the cause of action;
- (5) whether the debtor's insurer has assumed full responsibility for defending it;
- (6) whether the action primarily involves third parties;
- (7) whether litigation in another forum would prejudice the interests of other creditors;
- (8) whether the judgment claim arising from the other action is subject to equitable subordination;
- (9) whether movant's success in the other proceeding would result in a judicial lien avoidable by the debtor;
- (10) the interests of judicial economy and the expeditious and economical resolution of the litigation;
- (11) whether the parties are ready for trial in the other proceeding; and
- (12) the impact of the stay on the parties and the balance of harms.

*Sonnax Indus., Inc. v. Tri Component Products Corp. (In re Sonnax Indus., Inc.)*, 907 F.2d 1280, 1286 (2d Cir. 1990).

26. With regard to *Sonnax*, the Second Circuit has since clarified that “[n]ot every one of these factors will be relevant in every case...ultimate determination whether to lift a stay depends upon the facts underlying a given motion.” *Schneiderman v. Bogdanovich (In re Bogdanovich)*, 292 F.3d 104, 110 (2d Cir. 2002) (citations omitted); *see also In re Anton*, 145 B.R. 767, 770 (Bankr. E.D.N.Y. 1992) (“Not all twelve factors will necessarily be involved, nor must equal weight be assigned to each factor.”); *Cont'l Casualty Co. v. Pfizer, Inc. (In re Quigley Co.)*, 361 B.R. 723, 744 (Bankr. S.D.N.Y. 2007).

27. An analysis of the relevant *Sonnax* factors is as follows:

(1) Stay relief may result in complete resolution of all issues and claims in the State Court Litigation, as the summary judgment motions seek dispositive rulings on all issues of liability in the case.

(2) Stay relief will not interfere with the Chapter 11 Cases. NIMO is requesting relief from the stay for only the limited purposes of (i) permitting NIMO to make a Restoration Request to the State Court and (ii) permitting the State Court to proceed to rule on the fully-briefed summary judgment motions as submitted, without a hearing (as the State Court has indicated it is prepared to do) and (iii) permitting the parties to appeal from such ruling; and (iv) permitting the applicable appellate courts to rule on any such appeal and/or appellate motion. Accordingly, the relief requested requires no additional work by the Debtors or their counsel that could pull their attention or focus from matters in the Chapter 11 Case. Nor does it require the Debtors to incur any additional expense (except as to any potential appeal from a summary judgment ruling). Rather, all work and expense necessary for the requested relief was incurred long before the Debtors' bankruptcy filing. Further, the Chapter 11 Cases are at their very early stages. Any plan that may be proposed by the Debtors will certainly address claims that might not then be liquidated. The Debtors do not anticipate the need to restructure material operational obligations. *See* First Day Declaration, ¶ 5, page 3.



(7) The State Court Litigation will not prejudice the interests of other creditors in the Chapter 11 Cases. The prompt liquidation of NIMO's claims against the Debtors will facilitate the Debtors' ability to formulate a plan of reorganization. NIMO is not seeking relief which would affect the rights of other creditors, such as allowing it to reinstate a lien. Rather, it is just seeking an opportunity to liquidate its claims, if any, against the Debtors in these bankruptcy proceedings.

(8) & (9) There are no issues of equitable subordination or judicial lien avoidance to interfere with the Debtors' reorganization efforts.

(10) & (11) The advanced stage of the State Court Litigation establishes that the interests of judicial economy strongly favor the liquidation of NIMO's claims in the State Court Litigation rather than in the Bankruptcy Court. As noted, all discovery in the State Court Litigation was completed over a year ago, and a trial date of August 6, 2018 had been established. The summary judgment motions at issue in this request have been fully briefed, and the State Court is prepared to rule on them as submitted, without a hearing. Just weeks before the scheduled trial date and at the parties' request, the State Court stayed all matters in the State Court Litigation, including its issuance of a ruling on the summary judgment motions. Court decisions that have found no cause for stay relief based on judicial economy concerns have typically involved cases that were in their infancy and cases that had not progressed even to the discovery stage. Thus, the instant case is distinguishable from those such as *Sonnax* and

*RCM Global Long Term Capital Appreciation Fund, Ltd.*, 200 B.R. 514, 527 (Bankr. S.D.N.Y. 1996).

(12) The balance of the harms tilts in favor of NIMO. It would be prejudicial to require NIMO to bring this Court up to speed on the years of progress that have taken place in the New York State Supreme Court in the State Court Litigation. Because the Debtors do not anticipate the need to restructure material operational obligations, it would be needlessly prejudicial to require substantial delay for NIMO in liquidating its claim.

28. In addition to the above factors, the State Court Litigation involves specific questions of state law that the New York State Supreme Court is best positioned to handle. The instant case is distinguishable from *In re Hostess Brands, Inc.*, 2013 Bankr. LEXIS 79 (Bankr. S.D.N.Y. 2013) because the State Court Litigation does not involve a core bankruptcy issue.

29. The State Court is most familiar with this case, as the matter has been pending before it for over three years.

30. For all of the foregoing reasons, it would be more economical for both the Debtors and NIMO, and would promote judicial efficiency, to permit the State Court to resolve the issues and claims raised in the State Court Litigation. Moreover, NIMO is not currently requesting that the State Court Litigation be permitted to proceed to trial, but only that the matter be restored to the State Court's docket so that the State Court can proceed to rule on the fully-briefed summary judgment motions, which the court is prepared to do without the need for a hearing (as well as any appeal from such ruling and/or appellate motion that the parties may bring before the appropriate appellate court).

31. The facts and supporting documents detailed in this Motion provide more than sufficient “cause” for relief from the automatic stay under 11 U.S.C. § 362(d)(1).

**WAIVER OF FOURTEEN DAY STAY OF RELIEF IMPOSED BY  
FEDERAL RULE OF BANKRUPTCY PROCEDURE RULE 4001(a)(3)**

32. Pursuant to Fed. R. Bankr. P. 4001(a)(3), an order granting a motion for relief from the automatic stay made in accordance with Rule 4001(a)(3) is stayed until the expiration of fourteen (14) days after the entry of the order, unless the Court orders otherwise.

33. Because there is a pending state court action, it is respectfully requested that if the Court grants the application for relief from the automatic stay, that it also exercise its discretion to waive the fourteen (14) day stay of relief so that the State Court Litigation may promptly proceed toward a disposition of the summary judgment motions in order to liquidate NIMO’s claims, if any, against the Debtors.

**RESERVATION OF RIGHTS**

34. Nothing contained in this Motion or any actions taken pursuant to any order granting the relief requested by this Motion is intended or should be construed as a waiver or limitation of NIMO’s rights under the Bankruptcy Code or any other applicable law.

**MOTION PRACTICE**

35. This Motion includes citations to the applicable rules and statutory authorities upon which the relief requested herein is predicated and a discussion of its application to this Motion. Accordingly, NIMO respectfully submits that this Motion satisfies Local Rule 9013-1(a).

**NOTICE**

36. NIMO has provided notice of this Motion to Counsel for the Debtors, Counsel for the DIP Agent, Counsel for the Official Committee of Unsecured Creditors, the United States Trustee, and all parties receiving notice electronically through the Court's ECF system. NIMO believes that there is no other person or entity with a particularized interest in the subject matters of this motion.

**NO PRIOR REQUEST**

37. No prior request for the relief sought in this motion has been made to this or any other court.

**WHEREFORE**, NIMO respectfully requests that the Court grant an Order:

A. terminating or modifying the automatic stay imposed by 11 U.S.C. section 362 in these Chapter 11 Cases (i) to permit NIMO to request that the State Court restore the State Court Litigation to its docket and (ii) to permit the State Court to proceed to rule on the parties' fully-briefed summary judgment motions as submitted; (iii) permitting the parties to prosecute and/or otherwise participate in any appeal from such ruling, before an appropriate appellate court; and (iv) permitting those appellate courts to rule on any such appeal (and/or motion in connection therewith) that may come before either of them;

B. waiving the fourteen (14) day stay imposed by Fed. R. Bankr. P. 4001(a)(3); and

C. granting such other and further relief as the Court deems just and proper.

Dated: Syracuse, New York  
November 26, 2019

BARCLAY DAMON LLP

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Jon P. Devendorf  
J. Eric Charlton

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Co-Counsel for Niagara Mohawk Power  
Corporation

**EXHIBIT A**

**PROPOSED ORDER**

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

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

**ORDER MODIFYING THE AUTOMATIC STAY TO PERMIT NIAGARA MOHAWK  
POWER CORPORATION TO CONTINUE LIMITED PROSECUTION OF CERTAIN  
STATE COURT LITIGATION**

Upon the motion (the “Motion”) of Niagara Mohawk Power Corporation (“NIMO”) for entry of an order (this “Order”) terminating or modifying the automatic stay to permit NIMO to continue the limited prosecution of certain State Court Litigation against the Debtors through disposition of summary judgment motions (and any appeal therefrom), all as more fully set forth in the Motion; and this Court having jurisdiction over this matter pursuant to 28 U.S.C. §§ 157 and 1334 and the *Amended Standing Order of Reference from the United States District Court for the Southern District of New York*, dated February 1, 2012; and that this Court may enter a final order consistent with Article III of the United States Constitution; and this Court having found that venue of this proceeding and the Motion in this district is proper pursuant to 28 U.S.C. §§ 1408 and 1409; and this Court having found that this is a core proceeding pursuant to 28 U.S.C. § 157(b); and this Court having found that NIMO’s notice of the Motion and opportunity for a hearing on the Motion were appropriate under the circumstances and no other notice need be provided; and this Court having reviewed the Motion and all responses thereto, if any, including all documents submitted therewith; and this Court having heard the statements of counsel presented with respect to the Motion at a hearing, if any, before this Court (the “Hearing”); and this Court having determined that the legal and factual bases set forth in the

Motion and at the Hearing establish just cause for the relief granted herein; and upon all of the proceedings had before this Court; and after due deliberation and sufficient cause appearing therefor, it is **HEREBY ORDERED THAT:**

1. The Motion is granted as set forth herein.
2. The automatic stay is lifted and modified for the purposes of:
  - A. permitting NIMO to request that the New York State Supreme Court, Onondaga County (the “State Court”) restore the State Court Litigation to its docket in order to rule on the parties’ fully-briefed summary judgment motions (the “Summary Judgment Motions”); and
  - B. permitting the State Court to proceed to rule upon the Summary Judgment Motions upon the briefs and supporting documents as submitted and to enter a final order reflecting that ruling; and
  - C. permitting the parties to prosecute and/or otherwise participate in any appeal from such ruling by the State Court, before the New York State Supreme Court Appellate Division for the Fourth Judicial Department, and/or the New York State Court of Appeals; and
  - D. permitting those appellate courts to rule on any such appeal (and/or motion in connection therewith) that may come before either of those courts.
3. Should the State Court’s ruling on the Summary Judgment Motions result in a judgment being entered in the State Court Litigation against any one or more of the Debtors and in favor of NIMO (and as may be modified, affirmed, in whole, or in part, on any appeal therefrom), any such judgment shall not create any lien upon any property of any of the Debtors,



and NIMO shall not issue any process in the State Court Litigation in aid of the enforcement of any such judgment.

4. Notice of the Motion as provided therein shall be deemed good and sufficient notice of such Motion and the requirements of Bankruptcy Rule 4001(a) and the Local Rules are satisfied by such notice.

5. Notwithstanding anything to the contrary, the terms and conditions of this Order are immediately effective and enforceable upon its entry.

6. This Court retains exclusive jurisdiction with respect to all matters arising from or related to the implementation, interpretation, and enforcement of this Order.

DATED: White Plains, New York  
\_\_\_\_\_, 2019

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The Honorable Robert D. Drain  
United States Bankruptcy Judge

BARCLAY DAMON LLP

By: /s/ Jon P. Devendorf  
Jon P. Devendorf  
J. Eric Charlton  
125 East Jefferson Street  
Syracuse, New York 13202  
Telephone: (315) 425-2724  
Facsimile: (315) 425-8551  
Email: [jdevendorf@barclaydamon.com](mailto:jdevendorf@barclaydamon.com)  
[echarlton@barclaydamon.com](mailto:echarlton@barclaydamon.com)

and

Russell R. Johnson III (VSB No. 31468)  
John M. Craig (VSB No. 32977)  
Law Firm Of Russell R. Johnson III, PLC  
2258 Wheatlands Drive  
Manakin-Sabot, Virginia 23103  
Telephone: (804) 749-8861  
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[john@russelljohnsonlawfirm.com](mailto:john@russelljohnsonlawfirm.com)

Return date: December 18, 2019,  
at 10:00 a.m. ET  
Time for service of responsive  
papers: December 16, 2019

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

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**IN RE:**

Chapter 11

**WINDSTREAM HOLDINGS, INC., *et al.***

Case No. 19-22312 (RDD)  
(Jointly Administered)

*Debtors.*

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**DECLARATION OF JON P. DEVENDORF, IN SUPPORT OF  
MOTION BY NIAGARA MOHAWK POWER CORPORATION,  
PURSUANT TO 11 U.S.C. § 362(d) AND BANKRUPTCY RULE 4001,  
FOR RELIEF FROM THE AUTOMATIC STAY AND WAIVER OF  
THE STAY IMPOSED BY BANKRUPTCY RULE 4001(a)(3)**

Jon P. Devendorf, declares the following under penalties of perjury pursuant to 28 U.S.C.  
§ 1746:

1. I am an attorney duly licensed to practice law in the State of New York, and in this Court pursuant to Local Bankruptcy Rule 2090-1(a) and Local Civil Rule 1.3(a), and a partner of the law firm Barclay Damon LLP, attorneys for Plaintiff, Niagara Mohawk Power Corporation (“Movant” or “NIMO”) in the State Court Litigation (as defined herein).

2. I respectfully submit this Declaration in support of NIMO’s Motion, pursuant to 11 U.S.C. § 362(d) and Bankruptcy Rule 4001, for limited relief from the automatic stay and waiver of the stay imposed by Bankruptcy Rule 4001(a)(3). Generally speaking, the relief sought herein would lift the stay to the extent of enabling a ruling on dueling motions for summary judgment in a civil action entitled *Niagara Mohawk Power Corporation v. Windstream Communications, LLC, f/k/a Windstream Communications, Inc.*, No. 2015EF4568 (Supreme

Court, Onondaga County) (Karalunas, J.) (the “State Court Litigation”). Windstream Communications, LLC (“Debtor” or “Windstream”) is among the Debtors in this jointly administered contested matter.

3. The State Court Litigation is an action for money damages arising from Debtor’s breach of contract and failure to pay NIMO for costs it incurred to protect Debtor’s underground fiber-optic cables while rebuilding a 56-mile segment of NIMO’s transmission line in western upstate New York State.

4. Debtor’s responsibility for those costs is part of the consideration under a written contract allowing Debtor’s fiber-optic cables to occupy NIMO’s underground trench within that 56-mile segment.

5. Despite Debtor’s prior knowledge of the project, and despite its request that NIMO undertake the protective matting, Debtor thereafter refused to pay for the work as required by the parties’ contract.

6. Through its wrongful acts and omissions, Debtor has damaged NIMO in the amount of \$9,411,159.42, for the invoiced costs, as well as late fees as provided by agreement, and is further accountable to NIMO for interest and the legal fees, costs and expenses incurred to enforce its rights.

7. After Debtor failed to pay those costs, NIMO commenced the State Court Litigation in November 2015, filing a Complaint that raised state law claims for breach of contract, unjust enrichment, and *quantum meruit*.<sup>1</sup> A copy of the Complaint (without its exhibits), in the State Court Litigation, is attached as Exhibit 1.

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<sup>1</sup> NIMO’s Summons and Complaint, e-filed Nov. 6, 2015 (NYSCEF Doc. 1) (Ex. 1).

8. Following removal to Federal Court and remand in 2016, issue was joined in the State Court Litigation by service of an Answer, in which Debtor acknowledged being a party to the subject written agreement.<sup>2</sup> A copy of the Answer in the State Court Litigation, is attached as Exhibit 2.

9. In the three-plus years since remand, the State Court Litigation has been assigned exclusively to The Honorable Deborah H. Karalunas, Justice of Supreme Court.

10. In addition to overseeing the State Court Litigation schedule, Justice Karalunas has become fully informed of the relevant facts and legal issues underlying the parties' dispute, through conferences, discovery, and motion practice:

(a) CONFERENCES:

(1) May 2, 2016 (in-person): Justice Karalunas held a preliminary conference in chambers regarding procedural matters and development of a case schedule.

(2) December 12, 2017 (telephonic): Justice Karalunas held a conference to amend the case schedule in light of discovery status.

(3) June 26, 2018 (in-person): Justice Karalunas held a settlement conference in chambers, attended by counsel and respective client representatives.

(b) MOTIONS:

(1) Discovery Motion (return date April 12, 2017): Justice Karalunas granted Debtor's motion to compel responses to certain requests for confidential information and documents concerning NIMO's

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<sup>2</sup> Debtor's Answer, e-filed April 1, 2016 (NYSCEF Doc. 22) (Ex. 2).

relationship with a nonparty. Together, the parties' discovery motion papers consisted of two (2) memoranda of law, two (2) attorney affirmations, two (2) client affidavits, and twenty-three (23) documentary exhibits. Debtor's motion was granted-in-part and denied-in-part by Justice Karalunas, with NIMO's responses subject to redaction as necessary to preserve competitively sensitive information.

(2) Summary Judgment Motions (fully briefed and submitted June 20, 2019): NIMO moved for summary judgment on its breach of contract claim, and Debtor separately moved for summary judgment of dismissal of the entirety of NIMO's Complaint. Deemed fully submitted as of June 20, 2019, the motion papers before Justice Karalunas consisted of (among other things) six (6) memoranda of law, three (3) attorney affirmations, one (1) party affidavit, eighty-five (85) documentary exhibits (including deposition transcripts and several oversized maps of the property/facilities at issue), and one (1) report of Debtor's outside consultant.

11. After discovery closed in the spring of 2018, a trial of the State Court Litigation was scheduled to begin on August 6, 2018.

12. Although prepared for such trial, the parties exerted significant efforts in creating a comprehensive summary judgment record to enable Justice Karalunas to issue dispositive rulings in lieu of trial with respect to all issues of liability.<sup>3</sup> Copies of the summary judgment

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<sup>3</sup> Debtor's Notice of Motion for Summary Judgment, e-filed May 25, 2018 (NYSCEF Doc. 110) (Ex. 3); NIMO's Notice of Motion for Summary Judgment, e-filed May 25, 2018 (NYSCEF Doc. 149) (Ex. 4).

exhibits are not submitted herewith, but can be made available upon request. However, copies of the parties' Notices of Motion for summary judgment are attached as Exhibit 3 and Exhibit 4, respectively.

13. As of June 15, 2018 the summary judgment motions had been fully briefed, and Judge Karalunas indicated a preparedness to rule on the summary judgment motions without the need for a hearing.

14. Prior to the scheduled trial, and prior to a summary judgment ruling, the State Court Litigation was marked off the calendar for one year, to accommodate the parties' joint request for time to discuss settlement.

15. The State Court Litigation may be restored to Justice Karalunas' docket by a letter from counsel indicating that settlement discussions have not been successful and that the matter should be restored and the summary judgment motions decided.

16. The only discussions that took place regarding settlement after Justice Karalunas marked the case off her docket pending settlement discussions was a brief email thread between counsel in August 2018 concerning looking into dates and names of persons to be involved in settlement discussions. There were almost no further communications from Debtors' Litigation Counsel to NIMO's counsel between August 2018 and the Petition Date.

17. Before that one year settlement window closed, Debtor filed its petition for relief under Chapter 11 of the Bankruptcy Code, which eventually was consolidated with the other related Chapter 11 Cases.

**WHEREFORE**, based on the foregoing, NIMO respectfully requests an Order granting NIMO's motion in its entirety, and for such other and further relief as this Court deems just, equitable, and proper.

I, Jon P. Devendorf, declare under penalty of perjury that the foregoing is true and correct.

**Dated:** November 25, 2019

A handwritten signature in black ink, reading "Jon P. Devendorf". The signature is written in a cursive, flowing style.

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**JON P. DEVENDORF**



# **EXHIBIT 1**

STATE OF NEW YORK  
SUPREME COURT COUNTY OF ONONDAGA

**NIAGARA MOHAWK POWER CORPORATION**

300 Erie Boulevard West  
Syracuse, New York 13202,

**SUMMONS**

*Plaintiff,*

Index No. \_\_\_\_\_

-vs-

**WINDSTREAM COMMUNICATIONS, LLC, f/k/a  
WINDSTREAM COMMUNICATIONS, INC.**

4001 Rodney Parham Road  
Little Rock, Arkansas 72212,

*Defendant.*

**TO THE ABOVE-NAMED DEFENDANT:**

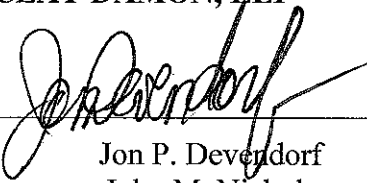
**YOU ARE HEREBY SUMMONED** and required to serve upon Plaintiff's attorneys an Answer to the Complaint in this action within twenty (20) days after service of this Summons, exclusive of the day of service, or within thirty (30) days after service is complete if this Summons is not personally delivered to you within the State of New York. In case of your failure to answer, Judgment will be taken against you by default for the relief demanded in the Complaint.

The basis of venue in this action is the residence and principal office of Plaintiff, pursuant to Civil Practice Law and Rules ("CPLR") Section 503(c).

**DATED:** November 6, 2015  
Syracuse, New York

**BARCLAY DAMON, LLP**

By: \_\_\_\_\_



Jon P. Deventorf  
John M. Nichols

*Attorneys for Plaintiff*  
*Niagara Mohawk Power Corporation*  
One Park Place  
300 South State Street  
Syracuse, New York 13202  
Telephone (315) 425-2770

STATE OF NEW YORK  
SUPREME COURT COUNTY OF ONONDAGA

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**NIAGARA MOHAWK POWER CORPORATION,**

*Plaintiff,*

**COMPLAINT**

-vs-

Index No. \_\_\_\_\_

**WINDSTREAM COMMUNICATIONS, LLC f/k/a  
WINDSTREAM COMMUNICATIONS, INC.,**

*Defendant.*

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Plaintiff Niagara Mohawk Power Corporation (“Niagara Mohawk” or the “Company”), by its attorneys, Barclay Damon, LLP, as and for its Complaint against Defendant Windstream Communications, LLC, formerly known as Windstream Communications, Inc. (“Windstream” or “Defendant”), hereby alleges that:

**NATURE OF ACTION**

1. This is an action for money damages arising from Windstream’s breach of contract and failure to pay Niagara Mohawk for costs it incurred to protect Windstream’s fiber-optic cables as part of a transmission rebuild project. Despite its knowledge of and request that Niagara Mohawk undertake the protective work on its behalf, Windstream thereafter refused to pay for the work as required by the parties’ contract. Through its wrongful acts and omissions, Windstream has damaged Niagara Mohawk in the amount of \$9,411,159.42 for the invoiced costs, as well as late fees as provided by agreement, and is further accountable to Niagara Mohawk for interest and the legal fees, costs and expenses of this action.

### **PARTIES**

2. At all times relevant hereto, Niagara Mohawk was and is a corporation organized and existing under the laws of the State of New York, with a principal business office located at 300 Erie Boulevard West, Syracuse, New York 13202, in Onondaga County.

3. Upon information and belief, Defendant Windstream is a foreign limited liability company organized and existing under the laws of the State of Delaware, with a principal business office located at 4001 Rodney Parham Road, Little Rock, Arkansas 72212, and is the successor to Windstream Communications, Inc.

### **VENUE AND JURISDICTION**

4. The Court has jurisdiction over the subject matter of this action pursuant to Judiciary Law Section 140-b.

5. The Court has personal jurisdiction over Defendant pursuant to CPLR Section 302 because Defendant transacts business within the state and contracts to provide services within the state.

6. This action is properly venued in this Court pursuant to CPLR Section 503(c).

### **FACTUAL BACKGROUND**

#### **Niagara Mohawk.**

7. Niagara Mohawk provides electricity and natural gas to more than 2 million people throughout upstate New York.

8. Niagara Mohawk provides its electric services through a network of overhead and underground transmission and distribution lines across upstate New York.

9. Certain of Niagara Mohawk's transmission and distribution lines are situated on real property to which the Company holds a right-of-way or other possessory or ownership interest.

10. In the case of underground facilities, Niagara Mohawk at times enters into third-party agreements to allow other utilities and telecommunications providers to occupy space for their facilities in the underground trench.

11. From time to time, Niagara Mohawk's electric transmission and distribution facilities are maintained, updated and otherwise rebuilt to suit Company and customer service needs.

**The Agreement.**

12. On or about April 10, 2002, Niagara Mohawk and Dominion Telecom, Inc. ("Dominion") entered into a certain "Right of Occupancy Agreement Authorizing Use of Certain Niagara Mohawk Rights-of-Way", and an addendum thereto known as the "Addendum to Niagara Mohawk Right of Occupancy Agreement in Connection with the Sale of Telergy Assets" (together, the "Agreement"). A true and accurate copy of the Agreement is annexed hereto as Exhibit A.

13. Upon information and belief, Windstream, through various acquisitions, succeeded to the rights and obligations of Dominion under the Agreement.

14. Upon information and belief, Windstream provides telecommunications services to customers by way of networks of fiber-optic cables ("Cables"), some of which are located in upstate New York.

15. In return for compliance with certain financial and other obligations, the Agreement confers a right on Windstream to occupy and use certain real property in which Niagara Mohawk has possessory rights and holds underground facilities.

16. Pursuant to the Agreement, Windstream owns and operates underground Cables at various locations which are located beneath the surface of land that is owned, used, or possessed by Niagara Mohawk.

17. Among other rights and obligations, the Agreement expressly addresses the costs associated with the maintenance of the property and the protection of underground facilities.

18. Under Section 8(a) of the Agreement, Windstream bears the obligation to pay for any activities which are undertaken pursuant to 16 NYCRR Part 753 for the protection of underground facilities.

19. Under Section 8(c) of the Agreement, Windstream is also responsible for any incremental increases in the costs of maintenance services undertaken by Niagara Mohawk to the real property, or for right-of-way maintenance that is provided for the sole benefit of Windstream.

20. In the same manner, Section 20(a) of the Agreement requires Windstream to pay Niagara Mohawk for work performed at the request, benefit or obligation of Windstream.

21. Windstream is also required under Sections 8(c) and 20(a) of the Agreement to reimburse Niagara Mohawk for such costs incurred for its protection and benefit within thirty (30) days of invoicing, and further entitles Niagara Mohawk to recover its actual costs, plus ten percent (10%), in the event the Company uses outside contractors or consultants in performing such work.

22. As a result of Windstream's breach, it is required by law and agreement to pay late fees, interest, costs, and reasonable attorneys' fees to Niagara Mohawk. (See Agreement §§ 8(c), 20(a), 37(b).)

**Lockport-Mortimer #111 Rebuild Project.**

23. In or around May 2011, Niagara Mohawk provided notice that it would perform Right-of-Way Maintenance to a fifty-six (56) mile segment of the Company's transmission network between Lockport, New York, and Mortimer, New York (the "Lockport-Mortimer #111 Rebuild Project" or the "Project").

24. On December 23, 2011, Windstream acknowledged awareness of the Project in a letter from Richard Hammetter, Defendant's Director of Outside Plant Network ("December Letter"). A true and accurate copy of the December Letter is annexed hereto as Exhibit B.

25. Upon information and belief, by that time, Windstream had acquired the Agreement and the rights and obligations formerly held by Dominion.

26. In the December Letter, Windstream demanded, among other things, that Niagara Mohawk "utilize appropriate ground protection (i.e. matting, plates, etc.)" over areas wherein Defendant's Cables would be crossed with heavy trucks or equipment (the "Protective Matting").

27. From January 2012 to February 2012, Niagara Mohawk provided Protective Matting as demanded by Windstream in connection with the Project.

28. The sole purpose for the Protective Matting was to protect Windstream's Cables, and the sole benefit of such efforts was to Windstream.

29. On or about March 9, 2012, Niagara Mohawk contacted Director Hammetter, and asked for additional direction as to where the Protective Matting should be placed with respect to Windstream's Cables ("March Letter") and expressly reserved its contractual right to reimbursement for the incremental increase in costs Plaintiff incurred in utilizing the Protective Matting. A true and accurate copy of the March Letter is annexed hereto as Exhibit C.

30. Following a meeting of representatives, on or about April 9, 2012, Niagara Mohawk provided Windstream with an estimate of the contractor's costs to complete the Protective Matting for the remainder of the Project ("April Letter"). A true and accurate copy of the April Letter is annexed hereto as Exhibit D.



31. The April Letter again stated that Niagara Mohawk would require reimbursement of all incremental increases in cost incurred to protect Windstream's Cables, which costs were then estimated to be \$6.9 million (which included approximately \$1.47 million in costs then accrued).

32. From April 2012 through November 2012, Niagara Mohawk continued installing Protective Matting for the benefit of Windstream.

33. On or about May 7, 2012, Niagara Mohawk sent Windstream Invoice number 00036-084435 in the amount of \$1,927,179.69 ("May Invoice") for the Protective Matting used between January and February 2012. A true and accurate copy of the May Invoice is annexed hereto as Exhibit E.

34. In response, on or about May 9, 2012, Windstream notified Niagara Mohawk that it was referring the matter to legal counsel. A true and correct copy of Defendant's May Email is annexed hereto as Exhibit F.

35. Despite having requested the Protective Matting and knowing that such work would be performed at its expense, on June 27, 2012, Windstream advised Niagara Mohawk that it "disputed" the May Invoice. True and accurate copies of the June 27th Email, and of the June 27th Letter are annexed hereto as Exhibit G and Exhibit H.

36. At no time prior to June 2012 did Windstream dispute its responsibilities for the cost of such work and it never rescinded its request that the work be performed by Niagara Mohawk.

37. So as not to delay the already in-progress Project along a fifty-six (56) mile electric facilities corridor, Niagara Mohawk continued and completed the Protective Matting Services for Windstream in or around November 2012.

38. Subsequently, Niagara Mohawk issued Windstream a revised Invoice in the amount of \$1,685,418.40, for the Protective Matting used between January and February 2012 ("Revised

May 2012 Invoice”) and Invoice number 800045728 in the amount of \$7,725,781.02 for the Protective Matting Services performed between April 2012 and November 2012 (“January 2014 Invoice”). True and accurate copies of the Revised May 2012 Invoice and the January 2014 Invoice are annexed hereto as Exhibit I and Exhibit J.

39. No objection has been made concerning the installation of the Protective Matting over Windstream’s Cables or the cost of the Protective Matting as reflected in the invoices.

40. Despite due demand, Windstream has wrongfully failed to pay Niagara Mohawk as required by the Agreement for the services undertaken at its request and for its benefit.

**AS AND FOR A FIRST CAUSE OF ACTION**  
(Breach of Contract)

41. Plaintiff repeats and realleges each of the allegations set forth above as if set forth in full.

42. As set forth herein, Niagara Mohawk and Windstream are the interested parties to the Agreement which addresses responsibility for, among other things, costs such as those incurred for the Protective Matting.

43. As set forth herein, Niagara Mohawk utilized such Protective Matting at the direction of and to benefit Windstream which agreed to bear the cost of expenses associated with protecting underground facilities.

44. As set forth herein, Niagara Mohawk has at all times performed the Agreement.

45. As set forth herein, Windstream has breached the Agreement by failing and refusing to pay the Invoices issued by Niagara Mohawk within thirty (30) days as required by the Agreement.

46. As set forth herein, Niagara Mohawk has been damaged by the wrongful acts and omissions of Windstream.

47. As a result of the forgoing, Niagara Mohawk is entitled to damages in an amount no less than \$9,411,159.42 along with late fees, interest and the legal fees and expenses of this action.

**AS AND FOR A SECOND CAUSE OF ACTION**  
(Unjust Enrichment)

48. Niagara Mohawk repeats and realleges each of the allegations set forth above as if set forth in full.

49. As set forth herein, the Protective Matting was installed for the sole benefit of Windstream.

50. As set forth herein, Windstream has been enriched by Niagara Mohawk's performance of the Protective Matting Services.

51. As set forth herein, such enrichment was at Niagara Mohawk's expense and is therefore unjust and inequitable.

52. As a result of the forgoing, Niagara Mohawk is entitled to damages in an amount no less than \$9,411,159.42 along with late fees, interest and the legal fees and expenses of this action.

**AS AND FOR A THIRD CAUSE OF ACTION**  
(*Quantum Meruit*)

53. Niagara Mohawk repeats and realleges each of the allegations set forth above as if set forth in full.

54. As set forth herein, Niagara Mohawk utilized the Protective Matting Services in good faith and upon the demand of Windstream.

55. As set forth herein, Windstream was aware of the Protective Matting and accepted the benefit thereof.

56. As set forth herein, Niagara Mohawk expected to be compensated for the costs of the Protective Matting that was provided to Windstream.

57. As set forth herein, the just and reasonable value of the Protective Matting is an amount capable of determination.

58. As a result of the forgoing, Niagara Mohawk is entitled to damages in an amount no less than \$9,411,159.42 along with late fees, interest and the legal fees and expenses of this action.

**JURY DEMAND**

Niagara Mohawk demands a trial by jury on all issues so triable.

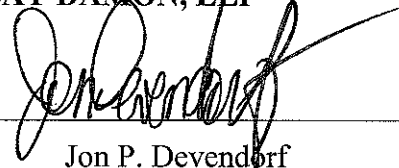
**WHEREFORE**, Niagara Mohawk demands Judgment as follows:

1. On the cause of action for breach of contract, awarding damages no less than \$9,411,159.42 along with late fees, interest and the legal fees and expenses of this action.;
2. On the cause of action for unjust enrichment, awarding damages no less than \$9,411,159.42 along with late fees, interest and the legal fees and expenses of this action;
3. On the cause of action for *quantum meruit*, awarding damages no less than \$9,411,159.42 along with late fees, interest and the legal fees and expenses of this action; and
4. Awarding Niagara Mohawk such other and further relief as the Court deems just and proper.

**DATED:** November 6, 2015

**BARCLAY DAMON, LLP**

By: \_\_\_\_\_



Jon P. Devendorf  
John M. Nichols

*Attorneys for Plaintiff*  
*Niagara Mohawk Power Corporation*  
One Park Place  
300 South State Street  
Syracuse, New York 13202  
Telephone (315) 425-2770

**FAX SERVICE NOT ACCEPTED**

# **EXHIBIT 2**

**SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF ONONDAGA**

NIAGARA MOHAWK POWER CORPORATION,

*Plaintiff,*

v.

WINDSTREAM COMMUNICATIONS, LLC f/k/a  
WINDSTREAM COMMUNICATIONS, INC,

*Defendant.*

Index No. 2015EF4568

**ANSWER OF DEFENDANT WINDSTREAM COMMUNICATIONS, LLC f/k/a  
WINDSTREAM COMMUNICATIONS, INC. TO COMPLAINT**

Defendant Windstream Communications, LLC f/k/a Windstream Communications, Inc.  
("Windstream"), by and through its attorneys, answers the Complaint of Plaintiff Niagara  
Mohawk Power Corporation ("Niagara"), and states as follows:

**PARTIES**

1. Windstream denies the averments of paragraph 1.
2. Upon information and belief, Windstream admits that Niagara is a corporation organized and existing under the laws of the State of New York, with its principal place of business located at 300 Erie Boulevard West, Syracuse, New York 13202.
3. Admitted.

**VENUE AND JURISDICTION**

4. Paragraph 4 of the Complaint sets forth conclusions of law. Therefore, no response is necessary.

5. Paragraph 5 of the Complaint sets forth conclusions of law. Therefore, no response is necessary.

6. Paragraph 6 of the Complaint sets forth conclusions of law. Therefore, no response is necessary.

### **FACTUAL BACKGROUND**

7. Windstream denies knowledge or information sufficient to form a belief as to the truth of the averments of paragraph 7.

8. Windstream denies knowledge or information sufficient to form a belief as to the truth of the averments of paragraph 8.

9. Windstream denies knowledge or information sufficient to form a belief as to the truth of the averments of paragraph 9.

10. Windstream denies knowledge or information sufficient to form a belief as to the truth of the averments of paragraph 10, except states that, upon information and belief, Niagara enters into right of occupancy agreements with third parties.

11. Windstream denies knowledge or information sufficient to form a belief as to the truth of the averments of paragraph 11.

12. Windstream admits that on or about April 10, 2002, it entered into a Right of Occupancy Agreement and Addendum (“ROO Agreement”), but denies that the ROO Agreement applies to this dispute and/or obligates Windstream to pay over \$9.4 million for costs arising out of Niagara’s own project to upgrade its own electric transmission and distribution



facilities (Lockport-Mortimer #111 Rebuild Project) (“Project”). Windstream refers the Court to the ROO Agreement, attached to the Complaint as Exhibit A, for its terms.

13. Admitted.

14. Admitted.

15. Windstream denies the averments of paragraph 15, except states that the ROO Agreement confers a right on Windstream to occupy and use certain real property in which, upon information and belief, Niagara has a possessory interest and holds underground facilities. Windstream refers the Court to the ROO Agreement, attached to the Complaint as Exhibit A, for its terms.

16. Windstream denies the averments of paragraph 16, and refers the Court to the ROO Agreement, attached to the Complaint as Exhibit A, for its terms.

17. Windstream denies the averments of paragraph 17, and refers the Court to the ROO Agreement, attached to the Complaint as Exhibit A, for its terms. Windstream denies that the ROO Agreement applies to this dispute and/or obligates Windstream to pay over \$9.4 million for costs arising out of Niagara’s own Project to upgrade its own electric transmission and distribution facilities.

18. Windstream denies the averments of paragraph 18, and refers the Court to the ROO Agreement, attached to the Complaint as Exhibit A, for its terms. To the extent this paragraph sets forth conclusions of law, no response is necessary. Windstream denies that the ROO Agreement applies to this dispute and/or obligates Windstream to pay over \$9.4 million for

costs arising out of Niagara's own Project to upgrade its own electric transmission and distribution facilities.

19. Windstream denies the averments of paragraph 19, and refers the Court to the ROO Agreement, attached to the Complaint as Exhibit A, for its terms. To the extent this paragraph sets forth conclusions of law, no response is necessary. Windstream denies that the ROO Agreement applies to this dispute and/or obligates Windstream to pay over \$9.4 million for costs arising out of Niagara's own Project to upgrade its own electric transmission and distribution facilities.

20. Windstream denies the averments of paragraph 20, and refers the Court to the ROO Agreement, attached to the Complaint as Exhibit A, for its terms. To the extent this paragraph sets forth conclusions of law, no response is necessary. Windstream denies that the ROO Agreement applies to this dispute and/or obligates Windstream to pay over \$9.4 million for costs arising out of Niagara's own Project to upgrade its own electric transmission and distribution facilities.

21. Windstream denies the averments of paragraph 21, and refers the Court to the ROO Agreement, attached to the Complaint as Exhibit A, for its terms. To the extent this paragraph sets forth conclusions of law, no response is necessary. Windstream denies that the ROO Agreement applies to this dispute and/or obligates Windstream to pay over \$9.4 million for costs arising out of Niagara's own Project to upgrade its own electric transmission and distribution facilities.

22. Windstream denies the averments of paragraph 22.

23. Windstream denies the averments of paragraph 23.

24. Windstream denies the averments of paragraph 24, except states that Windstream sent the December 23, 2011 letter to Niagara. Windstream refers the Court to the letter for its content.

25. Windstream denies the averments of paragraph 25, except states that as of December 23, 2012, Windstream had acquired the ROO Agreement formerly held by Dominion.

26. Windstream denies the averments of paragraph 26, except states that in the December 23, 2011 letter Windstream advised, among other things, that “Based on prior discussions with [Niagara], [Windstream] requires that ... “[a]nywhere [Windstream] cable is to be ‘crossed’ with heavy trucks/equipment, [Niagara] shall utilize appropriate ground protection (i.e. matting, plates, etc.).” Windstream did not agree to pay for the protective matting and stated its expectation that “[Niagara] and its contractor’s [sic] shall be held liable for any damage to the [Windstream] cable or interruption of services cause by [Niagara] (or its contractor’s) activities.” Windstream refers the Court to the letter for its content. Niagara did not respond to this letter until March 9, 2012 (see Exhibit C attached to the Complaint).

27. Windstream denies the averments of paragraph 27, except states that in January 2012 Niagara began its work on its Project without any agreement between the parties (i) as to the appropriate cost of the ground protection and (ii) that Windstream would bear any or all of that cost, which Windstream now claims was over \$9.4 million.

28. Windstream denies the averments of paragraph 28. The work being done by Niagara was for Niagara’s own Project and for Niagara’s benefit, not for the “sole benefit” of

Windstream. In addition, upon information and belief, Niagara has its own fiber or other materials in the right of way and has an interest in protecting its own conduit from damage.

29. Windstream denies the averments of paragraph 29. Windstream refers the Court to the March 9, 2012 letter for its content (see Exhibit C attached to the Complaint). There is nothing in this letter evidencing an agreement between the parties (i) as to the appropriate cost of the ground protection and (ii) that Windstream would bear any or all of that cost, which Windstream now claims was over \$9.4 million.

30. Windstream denies the averments of paragraph 30, except Windstream states that the April 9, 2012 letter was the first cost estimate provided by Niagara to Windstream. The letter provided a total cost estimate of \$6.9 million. There is nothing in this letter evidencing an agreement between the parties (i) as to the appropriate cost of the ground protection or (ii) that Windstream would bear any or all of that cost, which Windstream now claims was over \$9.4 million. Windstream refers the Court to the April 9, 2012 letter for its content. In addition, there were other meetings between the parties in March 2012. Minutes from a March 20, 2012 demonstrate, among other things, Windstream's understanding that Niagara shall bear the cost of the protective matting, or at the very least, that there was no agreement that Windstream would bear the cost. (See March 20, 2012 meeting minutes with Windstream's additions/corrections accepted by Niagara attached hereto as Exhibit A). For instance, but not by way of limitation, the March 20, 2012 meeting minutes provide the following (Windstream's representative, Mike Juskow's additions/corrections to the minutes are included in italics):

- 7) Mike stated he does not have the time nor the support to quickly review the EM&CP drawing package to determine what areas are not intended to be protected. *Without impacted [sic] the progress of the job. Mike stated had*

*Windstream been given the drawing package in the design phase of the job they would have had ample time to review the entire package*

- 10) Mike stated that Windstream lawyers are currently reviewing the contract to determine who is responsible for fiber protection. While Windstream lawyers are analyzing the contract Mike is hesitant to continue proactively locating the fiber line and does not feel he is in a position to provide us modified direction on how to protect specific locations along the ROW.
- “*Windstream has marked more than 15 miles of the fiber and **until an agreement has been reached** we cannot waste our resources. Mike stated that the fiber should be protected with matting as it has been for the past 3 months and **feels National Grid is responsible for the cost involved**” (bold emphasis added)*
- 11) Mike outlined key concerns with this Project and his understanding of changes that have occurred from the 12/14/11 meeting held with National Grid at his office:
  - National Grid did not provide an ample advanced notice to Windstream prior to construction. Windstream received knowledge of the Project only a few weeks prior to construction. The minimal notice has impacted the Windstream resource plan and budget. Mike stated a two year advanced notice (*should have been involved in the beginning and I know this design was at least 2 years in the works*) would have been more appropriate for a Project of this size.
  - Mike had understood that at the conclusion of the 12/14/11 meeting that National Grid was going to protect the fiber with matting **without cost to Windstream**, then 3 months later National Grid now expects fiber protection costs to be paid by Windstream. (Scott has been unable to find any meeting notes of the 12/14/11 meeting held with Windstream) (emphasis added)

*National Grid (Chris Denny and Ed Donegan) requested a letter from Windstream legal (after our initial meeting in December 2011) with our protection requirements which was provided on December 23, 2011. These requirements were followed from the start of the project in January 2012 until March 9, 2012. And National Grid now sends a rebuttal letter 3 Months later which draws some questions.*

Niagara accepted and agreed with Windstream’s representative’s additions/corrections to the minutes in an email dated 3/26/12: “National Grid [Niagara] **agrees with additions and changes to the 3/20/12 meeting minutes.**” (Emphasis added) (See Exhibit A).

31. Windstream denies the averments of paragraph 31, except Windstream states that the April 9, 2012 letter was the first cost estimate provided by Niagara to Windstream. The letter provided a total cost estimate of \$6.9 million. There is nothing in this letter evidencing an agreement between the parties (i) as to the appropriate cost of the ground protection or (ii) that Windstream would bear any or all of that cost, which Windstream now claims was over \$9.4 million. Windstream refers the Court to the April 9, 2012 letter for its content.

32. Windstream denies the averments of paragraph 32, except that, upon information and belief, Niagara continued its Project during the April through November 2012 time period.

33. Windstream admits that on or about May 7, 2012, Niagara sent Windstream Invoice number 00036-084435 in the amount of \$1,927,179.69 ("May 2012 Invoice") (attached as Exhibit E to the Complaint) for work allegedly done in January and February 2012.

34. Windstream admits that it sent an email on May 9, 2012 to Niagara. Windstream refers the Court to the May 9, 2012 email for its content.

35. Windstream denies the averments of paragraph 35, except states that Windstream disputed the May 2012 Invoice. Windstream refers the Court to the June 27, 2012 email and letter to the Complaint as Exhibits G and H for their content.

36. Windstream denies the averments of paragraph 36. For example, but not by way of limitation, Windstream refers the Court to: (i) Windstream's December 23, 2011 letter (attached to the Complaint as Exhibit B); (ii) the March 20, 2012 meeting minutes (attached hereto as Exhibit A); and (iii) the May 9, 2012 Windstream email (attached to the Complaint as Exhibit F).

37. Windstream denies knowledge or information sufficient to form a belief as to the truth of the averments of paragraph 37, except states that, upon information and belief, Niagara continued to work on its Project.

38. Windstream denies the averments of paragraph 38, except states that Niagara (i) later issued a revised May 2012 Invoice in the amount of \$1,685,418.40 (“Revised May 2012 Invoice”); and (ii) nearly two years later issued Invoice number 800045728 dated **January 28, 2014** for alleged work in connection with Niagara’s Project for the period April 2012 through November 2012 (“January 2014 Invoice”).

39. Windstream denies the averments of paragraph 39. For example, but not by way of limitation, Windstream refers the Court to ¶¶ 30, 34, 35, and 36 above and the referenced Exhibits.

40. Windstream denies the averments of paragraph 40.

### **FIRST CAUSE OF ACTION**

41. Defendant repeats and incorporates its responses to the above paragraphs as if fully set forth herein.

42. Windstream denies the averments of paragraph 42. To the extent paragraph 42 of the Complaint sets forth conclusions of law, no response is necessary.

43. Windstream denies the averments of paragraph 43.

44. Windstream denies the averments of paragraph 44. To the extent paragraph 44 of the Complaint sets forth conclusions of law, no response is necessary.

45. Windstream denies the averments of paragraph 45.

46. Windstream denies the averments of paragraph 46.

47. Windstream denies the averments of paragraph 47.

### **SECOND CAUSE OF ACTION**

48. Defendant repeats and incorporates its responses to the above paragraphs as if fully set forth herein.

49. Windstream denies the averments of paragraph 49.

50. Windstream denies the averments of paragraph 50. To the extent paragraph 50 of the Complaint sets forth conclusions of law, no response is necessary.

51. Windstream denies the averments of paragraph 51. To the extent paragraph 51 of the Complaint sets forth conclusions of law, no response is necessary.

52. Windstream denies the averments of paragraph 52.

### **THIRD CAUSE OF ACTION**

53. Defendant repeats and incorporates its responses to the above paragraphs as if fully set forth herein.

54. Windstream denies the averments of paragraph 54. To the extent paragraph 54 of the Complaint sets forth conclusions of law, no response is necessary.

55. Windstream denies the averments of paragraph 55. To the extent paragraph 55 of the Complaint sets forth conclusions of law, no response is necessary.



56. Windstream denies knowledge or information sufficient to form a belief as to the truth of the averments of paragraph 56, and denies any such expectation could be reasonable. To the extent paragraph 56 of the Complaint sets forth conclusions of law, no response is necessary.

57. Windstream denies knowledge or information sufficient to form a belief as to the truth of the averments of paragraph 57. To the extent paragraph 57 of the Complaint sets forth conclusions of law, no response is necessary.

58. Windstream denies the averments of paragraph 58.

WHEREFORE, Defendant denies that Plaintiff is entitled to the relief requested therein, or to any other relief whatsoever, and respectfully requests that the Court (1) dismiss the Complaint with prejudice in its entirety, (2) award Defendant its attorneys' fees and costs to the extent permitted by law and/or by the parties' agreements, and (3) award Defendant any other relief the Court deems just and equitable.

### **AFFIRMATIVE DEFENSES**

#### **First Affirmative Defense**

Plaintiff's claims are barred for failure to state a claim upon which relief can be granted.

#### **Second Affirmative Defense**

Plaintiff's claims are barred, in whole or in part, by the doctrines of estoppel, waiver and/or laches.

#### **Third Affirmative Defense**

Plaintiff's claims are barred in whole or in part, by the applicable statutes of limitations.

#### **Fourth Affirmative Defense**

Plaintiff's claims are barred in whole or in part, by its unfair billing practices.

**Fifth Affirmative Defense**

Plaintiff's claims are barred in whole or in part by its failure to mitigate and lessen any damages Plaintiff may have sustained.

**Sixth Affirmative Defense**

Plaintiff's claims are barred in whole or in part by reason of its own prior breach of any applicable contract.

**Seventh Affirmative Defense**

Plaintiff's claims are barred in whole or in part by its own bad acts.

**Eighth Affirmative Defense**

Plaintiff's claims are barred in whole or in part by its breach of its duty of good faith and fair dealing.

**Reservation of Defenses**

Defendant reserves the right, as discovery continues, to assert additional defenses and/or claims as may be appropriate.

**JURY DEMAND**

Defendant demands a trial by jury on all issues so triable.

**REQUEST FOR RELIEF**

WHEREFORE, Defendant denies that Plaintiff is entitled to any relief under its causes of action for reasons set forth herein. Defendant respectfully requests that the Court:

- (1) Dismiss the Complaint with prejudice in its entirety;
- (2) Grant Defendant its attorneys' fees and costs to the extent permitted by law and/or by the parties' agreements; and
- (3) Award Defendant any other relief the Court deems just and equitable.

**FLASTER/GREENBERG P.C.**

By: 

Darren H. Goldstein, Esq.  
FLASTER/GREENBERG P.C.  
427 Bedford Road, Suite 390  
Pleasantville, NY 10570  
(856)382-2240  
*darren.goldstein@flastergreenberg.com*  
*Attorneys for Defendant, Windstream*  
*Communications, LLC f/k/a Windstream*  
*Communications, Inc.*

Dated: April 1, 2016

5604496 v1

# **EXHIBIT 3**

**FLASTER/GREENBERG P.C.**By: Donna T. Urban (*Pro Hac Vice*)

Darren H. Goldstein (#104747)

1810 Chapel Avenue West

Cherry Hill, NJ 08002-4609

(856) 661-2285 phone

(856) 661-1919 fax

donna.urban@flastergreenberg.com

*Attorneys for Defendant Windstream Communications, LLC f/k/a Windstream Communications, Inc.***STATE OF NEW YORK****SUPREME COURT COUNTY OF ONONDAGA**NIAGARA MOHAWK POWER  
CORPORATION,*Plaintiff,*

v.

WINDSTREAM COMMUNICATIONS, LLC f/k/a  
WINDSTREAM COMMUNICATIONS, INC.,*Defendant.*

Index No.: 2015EF4568

**NOTICE OF MOTION FOR  
SUMMARY JUDGMENT**

**TO:** Jon P. Devendorf, Esquire  
John M. Nichols, Esquire  
One Park Place, 300 South State Street  
Syracuse, New York 13202  
*Attorneys for Plaintiff, Niagara Mohawk Power Corp.*


**PLEASE TAKE NOTICE** that, on June 20, 2018, upon submission pursuant to this Court's February 28, 2018 Order, the undersigned, on behalf of defendant Windstream Communications, LLC f/k/a Windstream Communications, Inc. will move this Court for an Order granting defendant Summary Judgment, together with such other and further relief as this Honorable Court deems just and proper. Defendant's will rely upon Defendant's Memorandum of law in Support of Its Motion for Summary Judgment, Statement of Material Facts, Affirmation of Donna T. Urban, Esq. in Support of Defendant's Motion for Summary Judgment and

accompanying exhibits, Affidavit of Michael Juskow in Support of Defendant's Motion for Summary Judgment, and upon all pleadings and proceedings heretofore had herein.

**PLEASE TAKE FURTHER NOTICE** that answering motion papers, if any, are to be served and filed on June 8, 2018, and reply motion papers, if any, are to be served and filed on June 15, 2018 pursuant to this Court's May 24, 2018 Order.

**FLASTER/GREENBERG P.C.**

BY:

  
Donna T. Urban, Esquire  
*Attorney for Defendant*

Date: May 25, 2018

6714711

# **EXHIBIT 4**

STATE OF NEW YORK  
SUPREME COURT COUNTY OF ONONDAGA

NIAGARA MOHAWK POWER CORPORATION,

*Plaintiff,*

-vs-

WINDSTREAM COMMUNICATIONS, LLC, f/k/a  
WINDSTREAM COMMUNICATIONS, INC.,

*Defendant.*

**NOTICE OF MOTION  
FOR SUMMARY JUDGMENT**

Index No. 2015EF4568

**PLEASE TAKE NOTICE:**

**MOTION BY:**

**BARCLAY DAMON LLP**

*Attorneys for Plaintiff*

*Niagara Mohawk Power Corporation*

Barclay Damon Tower

125 East Jefferson Street

Syracuse, New York 13202

Telephone: (315) 425-2724

Facsimile: (315) 425-8551

Email: jdevendorf@barclaydamon.com

**RETURN DATE:**

Wednesday, June 20, 2018, 9:00 a.m.

**-- on submitted papers only --**

The Honorable Deborah H. Karalunas, J.S.C.

Supreme Court of the State of New York

for Onondaga County

Orange County Courthouse

401 Montgomery Street

Syracuse, New York 13202

**SUPPORTING PAPERS:**

Statement of Material Facts, dated May 25, 2018;

Affirmation of Jon P. Devendorf, dated May 25,  
2018, with exhibits;

Memorandum of Law, dated May 25, 2018.

**RELIEF DEMANDED:**

An Order:

(a) pursuant to CPLR 3212 granting summary  
judgment against Defendant, Windstream  
Communications, LLC, f/k/a Windstream  
Communications, Inc.;

(b) for such other and further relief as this Court  
deems just and proper.



**GROUND FOR RELIEF:**

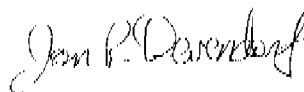
CPLR 3212.

**NATURE OF ACTION:**

Breach of contract.

**DEMAND FOR ANSWERING  
AFFIDAVITS:**

Movant demands that answering affidavits and memoranda be served on the attorneys pursuant to this Court's Order, dated May 24, 2018, with answering papers to be served no later than June 8, 2018, and reply papers to be served no later than June 15, 2018.

**Dated:** May 25, 2018**BARCLAY DAMON LLP**

By: \_\_\_\_\_

Jon P. Devendorf

John M. Nichols

*Attorneys for Plaintiff**Niagara Mohawk Power Corporation*

Barclay Damon Tower

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**TO: FLASTER/GREENBERG P.C.**Donna T. Urban, Esq. (*pro hac vice*)

Darren H. Goldstein, Esq.

*Attorneys for Defendant**Windstream Communications, LLC,**f/k/a Windstream Communications, Inc.*

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