

Hearing Date and Time: January 16, 2020, at 10:00 a.m. (prevailing Eastern Time)

Objection Deadline: January 9, 2020, at 4:00 p.m. (prevailing Eastern Time)

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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)

**NOTICE OF DEBTORS' MOTION FOR ENTRY OF AN ORDER
APPROVING THE DEBTORS' 2020 KEY EMPLOYEE RETENTION PLAN**

PLEASE TAKE NOTICE that on December 20, 2019, the above captioned debtors and debtors in possession (collectively, the "Debtors") filed the *Debtors' Motion for Entry of an Order Approving the Debtors' 2020 Key Employee Retention Plan* (the "Motion"). A hearing (the "Hearing") on the Motion will be held before the Honorable Robert D. Drain, United States Bankruptcy Judge, United States Bankruptcy Court for the Southern District of New York, 300 Quarropas Street, White Plains, New York 10601, on **January 16, 2020, at 10:00 a.m.** (prevailing Eastern Time).

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' 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.



PLEASE TAKE FURTHER NOTICE that any responses or objections to the relief requested in the Motion shall: (a) be 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 No. 392] (the “Case Management Order”) approved by the Court; (c) be filed electronically with the Court on the docket of *In re Windstream Holdings, Inc.*, Case 19-22312 (RDD) by registered users of the Court’s electronic filing system and in accordance with the General Order M-399 (which is available on the Court’s website at <http://www.nysb.uscourts.gov>); and (d) be served so as to be actually received by **January 9, 2020, at 4:00 p.m., prevailing Eastern Time**, by (i) the entities on the Master Service List (as defined in the Case Management Order and available on the Debtors’ case website at <http://www.kcellc.net/windstream>) and (ii) 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, the Debtors 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. The Debtors will file an agenda before the Hearing, which may modify or supplement the Motion to be heard 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: December 20, 2019
New York, New York

/s/ Stephen E. Hessler

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

In re:

WINDSTREAM HOLDINGS, INC., *et al.*,¹

Debtors.

)
) Chapter 11
)

) Case No. 19-22312 (RDD)

) (Jointly Administered)
)

**DEBTORS' MOTION FOR ENTRY OF AN ORDER
APPROVING THE DEBTORS' 2020 KEY EMPLOYEE RETENTION PLAN**

Windstream Holdings, Inc. and its debtor affiliates as debtors and debtors in possession in the above-captioned chapter 11 cases (collectively, the "Debtors") respectfully state the following in support of this motion:

Introduction

1. In the approximately nine months since the Petition Date, the Debtors have made substantial progress, including stabilizing their business operations and continuing to operate successfully and competitively even under the challenges of chapter 11, investigating,

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' 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.

commencing, and advancing litigation against Uniti Group, Inc. (“Uniti”) with respect to that certain agreement styled as a Master Lease between Windstream Holdings, Inc. and Uniti (the “Uniti Arrangement”), and engaging in mediation pursuant to the *Order Appointing a Mediator* [Docket No. 874] aimed at reaching a global resolution of the Debtors’ litigation claims against Uniti. The Debtors could not have achieved such progress without the efforts of their key non-insider employees. The ability to retain key non-insider employees remains critical to the efficient and effective completion of Debtors’ restructuring and emergence from chapter 11.

2. The Debtors’ employees are instrumental to the success of their business and day-to-day operations. During these chapter 11 cases, many employees have been forced to undertake tasks beyond the scope of their usual prepetition work. The Debtors must continue to retain employees who are integral to the Debtors’ ongoing business operations to preserve and maximize value during these chapter 11 cases, successfully complete their restructuring, and emerge on a timely basis from chapter 11. To ensure an ability to retain key employees, the Debtors previously sought approval of (and the Court ultimately approved) a key employee incentive program, which remained effective through 2019. By this motion, the Debtors seek approval of a key employee retention program for 2020 (the “2020 KERP”), which is necessary for the Debtors to maintain stability in their operations and maintain enterprise value and is consistent with retention programs in similar chapter 11 cases.

3. The 2020 KERP provides for payment of cash awards to certain of the Debtors’ non-insider employees. No potential 2020 KERP participant is an insider (as defined in the Bankruptcy Code), but instead play vital rank-and-file functions for the Debtors’ businesses. These employees perform essential accounting, cash management, IT infrastructure, legal, human resources, and facilities oversight and maintenance functions for the Debtors. The departure of

any of the 2020 KERP participants during these chapter 11 cases would disrupt ongoing operations at an important phase in the Debtors' restructuring process. As a result, the Debtors believe implementation of the 2020 KERP is necessary and appropriate to avoid costly disruptions.

4. Starting in March 2019, the Debtors have been working with their advisors, including Willis Towers Watson US LLC ("Willis Towers Watson"), an independent compensation consultant, to evaluate the Debtors' retention and incentive programs. As part of this review process, the Debtors, their advisors, and the compensation committee (the "Compensation Committee") of the Debtors' board of directors reviewed market data and analyses regarding compensation levels and program structure. This review culminated in the first key employee retention program (the "2019 KERP"), which was approved by this Court on May 15, 2019 [Docket No. 532]. To date, under the 2019 KERP, the Debtors made retention payments of approximately \$2.2 million to the 2019 KERP participants. In 2019, a total of 151 KERP awards were granted. The 2019 KERP proved generally successful; only three participants left their employment with the Debtors and forfeited their 2019 KERP award.

5. In light of the Debtors' ongoing restructuring efforts, the Debtors and the Compensation Committee (in consultation with their advisors) concluded that a retention program for calendar year 2020 on the terms embodied in the 2020 KERP was appropriate and necessary under the circumstances. Like the 2019 KERP, the 2020 KERP contemplates retention payments made in two installments to each of the 2020 KERP participants with an aggregate approximate cost of \$4 million in 2020. The Debtors plan to initially allocate approximately \$2 million of the 2020 KERP in early January 2020. The remainder of the 2020 KERP will be allocated by the Debtors' President and Chief Executive Officer at a later date, with participation and allocations determined in accordance with the guidelines described in this motion. The 2020 KERP

participants will include many of the 2019 KERP participants—these employees remain crucial to the Debtors’ continued success, and many of them remain retention risks.

6. The 2020 KERP complies with the applicable provisions of the Bankruptcy Code, is substantially similar to the 2019 KERP and other plans recently approved in other chapter 11 cases. It is also justified by the facts and circumstances of these cases and is within the Debtors’ sound and reasonable business judgment. For these reasons and the reasons set forth below, the Debtors respectfully request the Court enter an order authorizing the Debtors to implement the 2020 KERP.

Relief Requested

7. By this motion, the Debtors seek entry of an order, substantially in the form attached hereto as **Exhibit A**, approving the 2020 KERP. In support of the motion, the Debtors submit the declaration of Drew Smith, the Debtors’ senior vice president of financial planning and assistant treasurer, and the declaration of Zachary P. Georgeson, senior consulting director at Willis Towers Watson, both filed contemporaneously with this motion.

Jurisdiction and Venue

8. The United States Bankruptcy Court for the Southern District of New York has 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. The Debtors confirm their consent, pursuant to rule 7008 of the Federal Rules of Bankruptcy Procedure (the “**Bankruptcy Rules**”), to the entry of a final order by the Court in connection with this motion to the extent that it is later determined that the Court, absent consent of the parties, cannot enter final orders or judgments in connection herewith consistent with Article III of the United States Constitution.

9. Venue is proper pursuant to 28 U.S.C. §§ 1408 and 1409.

10. The bases for the relief requested herein are sections 105(a), 363(b), and 503(c) of title 11 of the United States Code (the “Bankruptcy Code”), and Rule 6004 of the Local Bankruptcy Rules for the Southern District of New York (the “Local Rules”).

Background

11. The Debtors are a leading provider of advanced network communications and technology solutions for businesses across the United States. The Debtors also offer broadband, entertainment and security solutions to consumers and small businesses primarily in rural areas in 18 states. Additionally, the Debtors supply core transport solutions on a local and long-haul fiber network spanning approximately 150,000 miles and have over 11,000 employees.

12. On February 25, 2019 (the “Petition Date”), each of the Debtors filed a voluntary petition for relief under chapter 11 of the Bankruptcy Code. A detailed description of certain facts and circumstances surrounding these chapter 11 cases is set forth in the *Declaration of Tony Thomas, Chief Executive Officer and President of Windstream Holdings, Inc., (I) in Support of Debtors’ Chapter 11 Petitions and First Day Motions and (II) Pursuant to Local Bankruptcy Rule 1007-2* [Docket No. 27], filed on the Petition Date.

13. The Debtors’ chapter 11 cases have been consolidated for procedural purposes only and are being jointly administered pursuant to Bankruptcy Rule 1015(b) [Docket No. 56]. The Debtors continue to operate their business and manage their property as debtors in possession pursuant to sections 1107(a) and 1108 of the Bankruptcy Code.

14. On May 15, 2019, the Court entered the *Order Approving the Debtors’ Key Employee Retention Plan* [Docket No. 532] approving the 2019 KERP.

The 2020 Key Employee Retention Program

I. The 2020 KERP Participants.

15. Certain of the Debtors' employees may be motivated to leave the Debtors' employ during the pendency of these chapter 11 cases due to, among other things, the continued uncertainty due to the Debtors' ongoing reorganization efforts. The potential 2020 KERP participants perform a variety of important business functions for the Debtors that are vital to the Debtors' ability to preserve and enhance stakeholder value. Many of the potential 2020 KERP participants have developed valuable institutional knowledge regarding the Debtors' business operations that would be difficult and expensive to replace on an expedited basis, and could very well harm the Debtors' prospect of a consensual resolution of mediation or a favorable litigation outcome and slow the Debtors' ability to emerge from chapter 11 on a timely basis. Moreover, the potential 2020 KERP participants have provided important support to the Debtors' advisors in meeting the additional demands imposed by chapter 11 and the Debtors' ongoing mediation and litigation efforts.

16. Given these demands placed upon the potential 2020 KERP participants during the chapter 11 cases, the Debtors believe that it is appropriate to make retention payments. Unless the Debtors continue to provide compensation designed to motivate employees to remain with the Debtors throughout the reorganization process, employee attrition could result in costly disruptions to the Debtors' operations. The Debtors respectfully submit that the 2020 KERP will increase the likelihood that these key employees are properly motivated to remain with the Debtors during the restructuring process, thereby preserving value for the Debtors, their estates, their creditors, and other parties in interest.

17. Although certain of the potential 2020 KERP participants have titles incorporating the word "director," "vice president," or "chief," no 2020 KERP participant is an "insider" of the

Debtors. Specifically, the 2020 KERP participants do not include any employee who: (a) is appointed or hired directly by the Debtors' board of directors; (b) exercises managerial control over, or has responsibility for, the Debtors' operations as a whole; or (c) directs the Debtors' overall corporate policy or governance.

II. The Retention Program.

18. Due to the importance of the 2020 KERP participants to the success of the Debtors' businesses, the Debtors, together with their advisors, worked to develop a revised retention program designed to offer competitive, fair compensation that would motivate the 2020 KERP participants to remain with the Debtors through the duration of their reorganization. Under the proposed program, 2020 KERP participants will receive two payments that vest ratably over one year, with 50% on the six-month anniversary and 50% on the one-year anniversary following execution of an award agreement. As noted above, the proposed 2020 KERP will not exceed \$4,000,000 in the aggregate.

19. The key terms of the 2020 KERP are summarized as follows:

- ***Eligible Participants:*** The 2020 KERP awards will be provided to select non-insiders that may be high retention risk and/or essential to the ongoing operations.
- ***2020 KERP Awards:*** 2020 KERP awards represent fixed cash amounts payable in two installments based on continued employment of the participant through the applicable payment dates (except as provided below). The award amount ranges are the same as the ranges in the 2019 KERP. Approximately \$2 million of the available 2020 KERP awards will be allocated in early January, with the remainder allocated according to the guidelines contained in this motion.
- ***Payment Dates:*** 50% of each participant's 2020 KERP payment will be paid six months following the effective date of the award agreement, with the remaining 50% paid twelve months following the effective date.
- ***Allocation:*** In no circumstance will an individual receive an award over the amount of \$250,000. In determining which employees will receive 2020 KERP grants, the Debtors' management team will consider (1) high retention risk

and/or essential to ongoing operations, (2) key sales personnel, and (3) employees with a heavier workload due to the bankruptcy cases.

- ***Termination of Employment:*** If a participant's employment is terminated by the Debtors without "cause" or due to death or disability, any then unpaid portion of the 2020 KERP payment will be accelerated and paid. If a 2020 KERP Participant's employment is terminated voluntarily or by the Debtors for cause, any remaining unpaid portion of the 2020 KERP payment will be forfeited.

20. Under the 2020 KERP, the Debtors' senior management team would have discretion to determine the amounts of 2020 KERP grants within certain specified ranges, which are the same as the ranges in the 2019 KERP. These ranges are based on seniority level existing bonus allocation practices. A summary of average minimum, mid-range, and maximum² 2020 KERP awards for each seniority level is below:

Non-Insider Group	Average Salary	Average Min 2020 KERP Award	Average Mid 2020 KERP Award	Average Max 2020 KERP Award
EVP	\$295,000	\$100,000	\$150,000	\$200,000
SVP	\$263,567	\$80,000	\$110,000	\$140,000
VP	\$196,158	\$40,000	\$60,000	\$80,000
Senior Directors, Sales VPs	\$165,771	\$15,000	\$22,500	\$30,000
Directors, Sales Directors	\$131,931	\$10,000	\$17,500	\$25,000
Sales Individual Contributors	\$81,224	\$10,000	\$20,000	\$30,000
Individual Contributors & Staff Managers	\$104,807	\$6,000	\$8,000	\$10,000
Others (Non-Bonus Eligible)	\$59,857	\$1,000	\$5,500	\$10,000

² Notwithstanding these ranges, as referenced above, no 2020 KERP bonus will exceed \$250,000.

III. Reasonableness of the 2020 KERP.

21. As set forth in the Georgeson declaration, the Debtors and their advisors reviewed the 2020 KERP to determine whether the design, structure, and cost of the 2020 KERP is reasonable and consistent with market practice. The Debtors designed the 2020 KERP keeping in mind their goals of maximizing the value of their estates for the benefit of all interested parties and ensuring that their operations are conducted in an effective and stable manner through emergence from chapter 11.

22. The Debtors worked closely with their advisors to ensure that the 2020 KERP is reasonable compared with postpetition retention plans implemented in other chapter 11 cases. In particular, and as set forth in more detail in the Georgeson declaration, personnel from Willis Towers Watson analyzed comparable non-insider retention plans approved in recent chapter 11 cases. Based on this review of comparable retention plans, the Debtors believe that the total cost of the 2020 KERP is reasonable relative to market comparables. Relative to comparable approved postpetition retention plans of chapter 11 peers, the 2020 KERP is positioned between the 50th and 75th percentiles on an absolute dollar basis and as a percentage of revenue.

23. The Debtors submit that the award opportunities in the 2020 KERP reflect a reasonable, market-based approach and are justified under the circumstances of these chapter 11 cases. The mid-range 2020 KERP award opportunities, both as a percentage of average base salary and in absolute dollar terms, are within market practice. Other features of the 2020 KERP are commonly found in the market, the inclusion of the maximum individual award limit, the installment payout feature based on multiple retention periods, and varied awards for participating employees. Further, the 2020 KERP's total cost of \$4,000,000 is reasonable in absolute terms when compared to the aggregate costs of key employee plans approved in other chapter 11 cases.

These award opportunities also closely follow what the Court approved under the Debtors' 2019 KERP.

Basis for Relief

I. The 2020 KERP Is a Sound Exercise of the Debtors' Business Judgment.

24. The Debtors' implementation of the 2020 KERP is a sound exercise of their business judgment. Section 363(b) of the Bankruptcy Code provides that a debtor "after notice and a hearing may use, sell or lease, other than in the ordinary course of business, property of the estate." 11 U.S.C. § 363(b)(1). To approve the use of estate property under section 363(b)(1) of the Bankruptcy Code, a debtor must show that the decision to use the property outside of the ordinary course of business was based on the debtor's business judgment. *See, e.g., In re Chateaugay Corp.*, 973 F.2d 141, 143 (2d Cir. 1992) (holding that a judge determining a 363(b) application must find a good business reason to grant such application); *see also In re Lionel Corp.*, 722 F.2d 1063, 1070 (2d Cir. 1983) (requiring "some articulated business justification" to approve the use, sale or lease of property outside the ordinary course of business); *In re Glob. Crossing Ltd.*, 295 B.R. 726, 743 (Bankr. S.D.N.Y. 2003); *In re Ionosphere Clubs, Inc.*, 100 B.R. 670, 675 (Bankr. S.D.N.Y. 1989) (noting that the standard for determining a Section 363(b) motion is "a good business reason"); *In re Borders Grp., Inc.*, 453 B.R. at 473 ("In approving a transaction conducted pursuant to section 363(b)(1), courts consider whether the debtor exercised sound business judgment.").

25. Once a debtor articulates a valid business justification, the law vests the debtor's decision to use property outside of the ordinary course of business with a strong presumption that "in making a business decision the directors of a corporation acted on an informed basis, in good faith and in the honest belief that the action was taken in the best interests of the company." *In re Integrated Res., Inc.*, 147 B.R. 650, 656 (S.D.N.Y. 1992) (citations and internal quotations

omitted), *appeal dismissed*, 3 F.3d 49 (2d Cir. 1993); *see also In re Johns-Manville Corp.*, 60 B.R. 612, 615–16 (Bankr. S.D.N.Y. 1986) (a “presumption of reasonableness attaches to a debtor’s management decisions” and courts will generally not entertain objections to the debtor’s conduct after a reasonable basis is set forth). Thus, if a debtor’s actions satisfy the business judgment rule, then the transaction in question should be approved under section 363(b)(1) of the Bankruptcy Code.

26. The implementation of the 2020 KERP is a proper exercise of the Debtors’ business judgment and is in the best interests of their estates and the interests of all stakeholders in these chapter 11 cases. The potential 2020 KERP participants—along with their skills, knowledge, and hard work—are critical to ensuring that the Debtors continue to maximize stakeholder value. The potential 2020 KERP participants are familiar with the Debtors’ businesses and have the experience and knowledge necessary to ensure the Debtors’ continued operations during the chapter 11 cases. Indeed, the potential 2020 KERP participants have already played a vital role in the Debtors’ smooth operations during these chapter 11 cases. The Debtors cannot easily replace the potential 2020 KERP participants without adversely affecting the Debtors’ operating efficiency and distracting management from the Debtors’ restructuring efforts. Accordingly, the Debtors’ decision to implement the 2020 KERP is a valid exercise of business judgment and in the best interest of the Debtors, their estates, and all parties in interest in these chapter 11 cases.

II. The 2020 KERP Is Justified by the Facts and Circumstances of These Chapter 11 Cases.

27. Section 503(c)(3) of the Bankruptcy Code permits payments to a debtor’s employees outside the ordinary course of business if such payments are justified by “the facts and circumstances of the case.” 11 U.S.C. § 503(c)(3). Importantly, section 503(c)(3)’s “facts and circumstances” justification test “creates a standard no different than the business judgment

standard under section 363(b) of the Bankruptcy Code.” *In re Velo Holdings, Inc.*, 472 B.R. 201, 209 (Bankr. S.D.N.Y. 2012); *In re Borders Grp. Inc.*, 453 B.R. 459, 473–74 (Bankr. S.D.N.Y. 2011) (evaluating debtors’ KERP under business judgment rule); *In re Dana Corp.*, 358 B.R. 567, 576–77 (Bankr. S.D.N.Y. 2006) (describing six factors that courts may consider when determining whether the structure of a compensation proposal meets the “sound business judgment test” in accordance with section 503(c)(3) of the Bankruptcy Code). Accordingly, whether a retention plan is justified by the facts and circumstances of the case and the analysis of whether the approval of such plan is a sound exercise of the debtor’s business judgment are the same.

28. In the context of approving compensation programs, courts in the Second Circuit have considered the factors identified in *In re Dana Corp.*, when determining if a compensation proposal and the process for developing it meet the “sound business judgment” test:

- Is there a reasonable relationship between the plan proposed and the results to be obtained, *i.e.*, will the key employee stay for as long as it takes for the debtor to reorganize or market its assets?
- Is the cost of the plan reasonable in the context of the debtor’s assets, liabilities, and earning potential?
- Is the scope of the plan fair and reasonable: does it apply to all employees, or if not, does it discriminate unfairly?
- Is the plan or proposal consistent with industry standards?
- What were the due diligence efforts of the debtor in investigating the need for a plan, analyzing which key employees need to be incentivized, what is available, and what is generally applicable in a particular industry?
- Did the debtor receive independent counsel in performing due diligence and in creating and authorizing the incentive compensation?

In re Dana Corp., 358 B.R. at 576–77 (Bankr. S.D.N.Y. 2006); *see e.g.*, *In re Residential Capital, LLC*, 491 B.R. 73, 85–86 (Bankr. S.D.N.Y. 2013) (applying the *Dana* factors to the debtors’ retention plan for non-insiders and approving the plan as an exercise of sound business judgment);

In re Borders Grp. Inc., 453 B.R. at 473–74 (same). No single factor is dispositive, and the Court has discretion to weigh each of these factors based on the specific facts and circumstances before it. *See, e.g., In re AMR Corp.*, 490 B.R. 158, 166 (Bankr. S.D.N.Y. 2013). Even the total absence of a factor may be permissible, so long as the interests of the Debtors are sufficiently protected. *See In re Borders Grp., Inc.*, 453 B.R. 459, 477 (finding that the lack of independent counsel was “not fatal” where the presence of other factors ensured “that the [d]ebtors’ interests were sufficiently protected.”); *In re Glob. Aviation Holdings Inc.*, 478 B.R. 142 (Bankr. E.D.N.Y. 2012) (noting that “the relatively modest size of the proposed bonus payouts made the retention of independent legal counsel economically inefficient.”). The Debtors respectfully submit that the proposed 2020 KERP satisfies the standard set forth above, each as discussed more fully below.

29. **First**, there is a reasonable relationship between the 2020 KERP and Debtors’ need to continue to retain important employees. The Debtors, in consultation with their advisors, designed the 2020 KERP to motivate and reward the 2020 KERP participants for their significant efforts given the increased demands placed upon them in connection with the chapter 11 process and the uncertainty presented by an ongoing reorganization process. The 2020 KERP will ensure that the Debtors have the appropriate staff on hand to facilitate a timely exit from these chapter 11 cases, thereby maximizing value for the Debtors’ estates. Specifically, the Debtors designed the 2020 KERP to ensure that the 2020 KERP participants remain employed with the Debtors through the remainder of the chapter 11 cases. A failure to retain the 2020 KERP participants would cause the Debtors to incur significant time and money to hire and train replacement employees, which would, in turn, hinder their reorganization to the detriment of all parties in interest.

30. **Second**, the cost of the 2020 KERP is reasonable given the Debtors’ assets and liabilities. As discussed above, Willis Towers Watson engaged in a benchmarking analysis to

assist the Debtors with the design of the 2020 KERP. The costs associated with the 2020 KERP are within the range of market practice as compared to plans proposed and approved at similarly situated companies in chapter 11. Moreover, the Debtors will be judicious in allocating any 2020 KERP awards, as they were with respect to 2019 awards. Accordingly, the costs are reasonable and well-justified given the size of the Debtors' businesses.

31. **Third**, the scope of the 2020 KERP is fair and reasonable. As they did with the 2019 KERP, the Debtors will undertake a careful selection process (and receive input from their advisors) in determining the specific employees that should be eligible for an award. All potential 2020 KERP participants would be employees that provide necessary services across the Debtors' businesses. Retaining employees who serve multiple entities allows the Debtors to leverage employees who are essential to the Debtors' chapter 11 efforts and continued efficient operation.

32. **Fourth**, the Debtors submit that the 2020 KERP is consistent with industry practice. As outlined in the Georgeson declaration, the 2020 KERP is more cost-effective than retention plans in other, similar chapter 11 cases in terms of total costs. With respect to eligibility, metrics, and payout timing, the 2020 KERP is similar to other plans recently approved in chapter 11 cases.

33. **Fifth**, the Debtors performed their due diligence in determining the need for the 2020 KERP. In developing the plan, the Debtors consulted with department heads to determine which employees were likely to leave or even actively searching for new work. As set forth more fully in the Georgeson declaration, the Debtors' then compared their proposed retention awards for 2020 KERP participants against similarly situated companies in chapter 11.

34. **Sixth**, the Debtors relied in part on the independent review of Willis Towers Watson and their other advisors in developing the 2020 KERP. The Debtors believe that the

interests of their estates have been adequately protected and that the 2020 KERP is justified by the facts and circumstances of these chapter 11 cases.

35. Accordingly, the Debtors respectfully submit that the 2020 KERP satisfies the “business judgment standard” identified in *In re Dana Corp.* Indeed, courts in this district have routinely granted relief well in excess of that requested herein. *See, e.g., In re Westinghouse Electric Co. LLC*, No. 17-10751 (MEW) (Bankr. S.D.N.Y. Sept. 12, 2017) (approving a KERP for 210 of the debtors’ non-insider employees with total cost of \$13,831,879); *In re Aéropostale, Inc.*, No. 16-11275 (SHL) (Bankr. S.D.N.Y. July 1, 2016) (approving a KERP for 38 employees with approximate payout of \$1.4 million); *In re SunEdison Inc.*, No. 16-10992 (SMB) (Bankr. S.D.N.Y. July 29, 2016) (approving a KERP for 126 employees with an estimated payout of \$7.0 million); *In re NII Holdings, Inc.*, No. 14-12611 (Bankr. S.D.N.Y. December 10, 2014) (approving a KERP for twelve employees with an approximate total cost of \$1.24 million).

III. Section 503(c)(1) of the Bankruptcy Code Is Inapplicable to the 2020 KERP.

36. Just as none of the 2019 KERP participants were “insiders” as defined in the Bankruptcy Code, none of the 2020 KERP participants are “insiders.” Accordingly, section 503(c)(1) is inapplicable to the 2020 KERP. Section 503(c)(1) of the Bankruptcy Code restricts payments made to “insiders of the debtor for the purpose of inducing such person to remain with the debtor’s business”—*i.e.*, those insider plans that are essentially “pay to stay” plans. 11 U.S.C. 503(c)(1). By its terms, section 503(c)(1) of the Bankruptcy Code does not apply where—as is the case here—participants in a retention-based program are *not* insiders.

37. Section 101(31) of the Bankruptcy Code provides that where a debtor is a corporation, insiders include any “(i) director of the debtor; (ii) officer of the debtor; (iii) person in control of the debtor . . . or (iv) relative of a . . . director, officer or person in control of the debtor.” 11 U.S.C. § 101(31)(B). Courts have also concluded that an employee may be an

“insider” if such employee has “at least a controlling interest in the debtor or . . . exercise[s] sufficient authority over the debtor so as to unqualifiably dictate corporate policy and the disposition of corporate assets.” *In re Velo Holdings, Inc.*, 472 B.R. 201, 208 (Bankr. S.D.N.Y. 2012) (citations omitted). It is well-established that an employee’s job title, alone, does not make such employee an “insider” as defined by the Bankruptcy Code. *See In re Borders Grp. Inc.*, 453 B.R. 459, 469 (Bankr. S.D.N.Y. 2011) (noting that “[c]ompanies often give employees the title ‘director’ or ‘director- level,’ but do not give them decision-making authority akin to an executive” and concluding that certain “director level” employees in that case were not insiders).

38. Although certain 2020 KERP participants hold titles including the term “director,” “vice president,” or “chief,” as set forth in the Smith declaration and found by the Court in connection with the 2019 KERP, none of the potential 2020 KERP participants are “insiders,” as such term is defined by section 101(31) of the Bankruptcy Code. None of the potential 2020 KERP participants have discretionary control over substantial budgetary amounts or significant control with respect to the Debtors’ corporate policies or governance. Therefore, the Debtors respectfully submit that none of the 2020 KERP participants constitute “insiders” of the Debtors, and the restrictions of section 503(c)(1) of the Bankruptcy Code are inapplicable to the 2020 KERP.

Waiver of Bankruptcy Rule 6004(h)

39. To implement the foregoing immediately, the Debtors seek a waiver, to the extent required, of the fourteen-day stay of an order authorizing the use, sale, or lease of property under Bankruptcy Rule 6004(h).

Motion Practice

40. 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, the Debtors submit that this motion satisfies Local Rule 9013-1(a).

Notice

41. The Debtors have provided notice of this motion to: (a) the entities on the Master Service List (as defined in the Case Management Order and available on the Debtors' case website at www.kccllc.net/windstream) and (b) any person or entity with a particularized interest in the subject matter of this motion. The Debtors respectfully submit that no other or further notice is necessary.

No Prior Request

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

[Remainder of page intentionally left blank]

WHEREFORE, the Debtors respectfully requests that the Court enter the Order granting the relief requested herein and such other relief as the Court deems appropriate under the circumstances.

Dated: December 20, 2019
New York, New York

/s/ Stephen E. Hessler

Stephen E. Hessler, P.C.

Marc Kieselstein, P.C.

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Counsel to the Debtors and Debtors in Possession

Exhibit A

Proposed Order

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

In re:

WINDSTREAM HOLDINGS, INC., *et al.*,¹

Debtors.

)
) Chapter 11
)

) Case No. 19-22312 (RDD)
)

) (Jointly Administered)
)

ORDER APPROVING THE DEBTORS' 2020 KEY EMPLOYEE RETENTION PLAN

Upon the motion (the "Motion")² of the above-captioned debtors and debtors in possession (collectively, the "Debtors") for entry of an order (this "Order"), approving the Debtors' 2020 key employee retention plan (the "2020 KERP"), all as more fully set forth in the Motion; and upon the Smith declaration and the Georgeson declaration; 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 this Court having the power to 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 the Debtors' 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 having heard the statements in support of the relief requested therein at a hearing

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' claims and noticing agent at <http://www.kccellc.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.

² Capitalized terms not otherwise herein defined shall have the meanings ascribed to such terms in the Motion.

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. Pursuant to sections 503(c) and 363(b)(1) of the Bankruptcy Code, the 2020 KERP is hereby approved.
3. The Debtors are authorized, but not directed, to implement the 2020 KERP and make the payments contemplated thereunder at the times specified in the Motion.
4. The Debtors may add a replacement participant(s) to the 2020 KERP upon the resignation or the termination for cause of any 2020 KERP participant.
5. Notwithstanding Bankruptcy Rule 6004(h), the terms and provisions of this Order shall be immediately effective and enforceable upon its entry.
6. The Debtors are authorized to take all actions necessary to effectuate the relief granted in this Order in accordance with the Motion.
7. The Court retains exclusive jurisdiction with respect to all matters arising from or related to the implementation, interpretation, and enforcement of this Order.

White Plains, New York
Dated: _____, 2020

THE HONORABLE ROBERT D. DRAIN
UNITED STATES BANKRUPTCY JUDGE