



“Amended Plan Supplement Notice”; and together with the Plan Supplement Notice, the “Notices”) and set forth the following:

## **FACTUAL BACKGROUND**

### **Procedural Facts**

1. On February 25, 2019 (the “Petition Date”), each of the Debtors filed a petition for relief under Chapter 11 of the Bankruptcy Code commencing these Chapter 11 Cases.

2. The Debtors are operating their business as debtors-in-possession, and no trustee or examiner has been appointed.

### **Facts Regarding Debtors’ Chapter 11 Plan and the Notices**

3. On May 14, 2020, the Debtors filed their *First Amended Joint Chapter 11 Plan of Reorganization of Windstream Holdings, Inc. et al. Pursuant to Chapter 11 of the Bankruptcy Code* [Docket No. 1812] (the “Plan”).

4. On June 3, 2020, the Debtors filed the Plan Supplement Notice, which attached the current version of the Assumed Executory Contract and Unexpired Lease List (the “Assumption and Cure List”), which is Exhibit A to the Plan and part of the Plan Supplement.

5. No CNE contracts are listed on the Assumption and Cure List.

6. On June 10, 2020, the Debtors filed the Amended Plan Supplement Notice, which attached the Rejected Executory Contract and Unexpired Lease List that is Exhibit B to the Plan (the “Rejected Contracts List”).

7. No CNE contracts are listed on the Rejected Contracts List.

8. The Notices provide that “the documents contained in the Plan Supplement are integral to, and are considered part of, the Plan” and that “[i]f the Plan is approved, the

documents contained in the Plan Supplement will be approved by the Court pursuant to the Confirmation Order.”

9. Article V.A. of the Plan provides that “[o]n the Effective Date, except as otherwise provided herein, all Executory or Unexpired Leases not otherwise assumed or rejected will be deemed assumed by the applicable Reorganized Debtor.”

10. The deadline for filing objections to the Plan, including the Plan Supplement, is June 17, 2020.

**Facts Regarding CNE’s Contracts With the Debtors**

11. CNE provides electricity and related services to the Debtors pursuant to the terms of the following agreements (together, the “CNE Agreements”):

- A. Master Retail Electricity Supply Agreement dated December 15, 2016 between EarthLink Carrier LLC and Constellation NewEnergy, Inc. and a related Constellation NewEnergy, Inc. Fixed Price Solutions Transaction Confirmation (collectively, the “MRESA”)
- B. Power Sale Agreement dated June 3, 2020 between Integrys Energy Services, Inc. (now CNE) and Paetec and a related Confirmation dated June 3, 2010 (collectively, the “PSA”)

12. CNE has continued to provide the Debtors with electricity and related services pursuant to the terms of the CNE Agreements since the Petition Date.

**Facts Regarding Cure Amounts Owing Under the CNE Agreements**

13. The Debtors currently owe the sum of \$23,187.66 in outstanding billed prepetition charges incurred under the MRESA and \$45,637.41 in outstanding billed prepetition charges incurred under the PSA (the “Cure Amounts”). Copies of the applicable invoices will be provided to the Debtors upon request.

14. CNE timely filed the following claims in the Debtors’ bankruptcy cases for prepetition balances owing under the CNE Agreements (the “Claims”):

- A. Claim # 5608 - \$23,187.66 against EarthLink Carrier, LLC (amending Claim # 5605)
- B. Claim # 5415 - \$45,637.41 against PaeTec Communications, LLC

The foregoing claims were timely filed and properly supported by copies of the applicable agreements and a summary of invoices comprising the claim amount.

- 15. Further, the Debtors are continuing to incur charges under the CNE Agreements.

### **DISCUSSION**

16. Because the CNE Agreements are not listed on the Assumption and Cure List or the Rejection List, the CNE Agreements will be assumed as of the Effective Date pursuant to the terms of the Plan.

- 17. Section 365(b)(1) of the Bankruptcy Code provides as follows:

If there has been a default in an executory contract or unexpired lease of the debtor, the trustee may not assume such contract or lease unless, at the time of assumption of such contract or lease, the trustee—

- (A) cures, or provides adequate assurance that the trustee will promptly cure, such default.
- (B) compensates, or provides adequate assurance that the trustee will promptly compensate, a party other than the debtor to such contract or lease, for any actual pecuniary loss to such party resulting from such default; and
- (C) provides adequate assurance of future performance under such contract or lease.

18. CNE does not oppose the Debtors' assumption and/or assignment of the Agreements, provided the Debtors do not seek to assume only portions of any Agreement while rejecting other portions thereof in a piecemeal fashion. It is well established that a contract cannot be assumed in part or rejected in part. Rather, a debtor is required under Section 365 of the Bankruptcy Code to either reject the contract in full or assume the contract in full, which includes the benefits and burdens. *AGV Productions, Inc. v. Metro-Goldwyn-Mayer, Inc.*, 115

F.Supp.2d. 378, 391 (S.D.N.Y. 2000) (debtor cannot assume executory contract in part and reject it in part); *see also In re Leslie Fay Cos., Inc.*, 166 B.R. 802, 808 (S.D.N.Y. 1994) (same); *In re Atlantic Computer Sys., Inc.*, 173 B.R. 844, 849 (S.D.N.Y. 1994) (same); *see also In re Plum Run Serv. Corp.*, 159 B.R. 496, 498 (Bankr. S.D. Ohio 1993) (noting that executory contract must be assumed or rejected by debtor in its entirety and cannot be dealt with in piecemeal fashion); *In re Plitt Amusement Co. of Washington, Inc.*, 233 B.R. 837, 840 (Bankr. C.D. Cal. 1999) (holding that trustee must assume or reject executory contract as whole, and cannot retain beneficial aspects of such contract while rejecting its burdens).

19. CNE's Claims filed in these bankruptcy proceedings, as described above, were timely filed and adequately supported by proper documentation, and thus constitute *prima facie* evidence that the filed claim amounts are validly due and owing to CNE under the applicable CNE Agreements. Fed. R. Bankr. P. 3001 ("A proof of claim executed and filed in accordance with these rules shall constitute prima facie evidence of the validity and amount of the claim.").

20. If the Debtors want to assume and/or assign any of their contracts with CNE identified above, they must first pay to CNE the cure amounts set forth above, plus any additional post-petition charges incurred by the Debtors under the applicable CNE Agreement(s) through the effective date of assumption.

**WHEREFORE**, CNE respectfully requests that the Court enter an Order:

A. Requiring, as a condition to the Debtors' assumption and/or assignment of any of the CNE Agreements that the Debtors pay all unpaid prepetition and post-petition amounts accrued thereunder through the effective date of assumption, including the Cure Amounts set forth above; and

B. Granting such other and further relief as the Court deems just and proper.

Dated: Garden City, New York  
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