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*Counsel to TierPoint, LLC, et al.*

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

In re:

WINDSTREAM HOLDING, INC., *et al.*,<sup>1</sup>

Debtors.

)  
)  
)  
) Case No. 19-22312 (RDD)  
) Chapter 11  
)  
)  
) Related to Docket No. 1812, 1973

**LIMITED OBJECTION OF TIERPOINT, LLC, ET AL. TO  
DEBTORS' FIRST AMENDED JOINT CHAPTER 11 PLAN AND  
NOTICE OF FILING OF PLAN SUPPLEMENT**

TierPoint, LLC, TierPoint Hosted Solutions, LLC, and TierPoint Oklahoma, LLC, (collectively, "TierPoint"), by and through counsel, hereby files this Limited Objection (the "Objection") to Debtors' *First Amended Joint Chapter 11 Plan of Reorganization of Windstream Holdings, Inc., et al.* [Docket No. 1812] (the "Plan")<sup>2</sup> and *Notice of Filing of Plan Supplement* [Docket No. 1973] (the "Assumption Notice"), and respectfully represents as follows:

1. On February 25, 2019 (the "Petition Date"), each of the Debtors filed their voluntary petitions for relief under Chapter 11 of the Bankruptcy Code before the United States Bankruptcy Court for the Southern District of New York (the "Bankruptcy Court").

<sup>1</sup> The last four digits of Debtor Windstream Holding, Inc.'s tax identification number are 7717. Due to the large number of debtor entities in these chapter 11 cases, for which the Debtors have requested joint administration, a complete list of the debtor entities and the last four digits of their federal tax identification numbers is not provided herein. A complete list of such information may be obtained on the website of the Debtors' proposed claims and noticing agent at <http://www.kecIlc.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.

<sup>2</sup> Terms not otherwise defined here shall have the meanings ascribed to them in the Cure Notice and accompanying documents.



2. The Debtors have continued to operate their business and manage their properties as debtor's-in-possession pursuant to 11 U.S.C. §§ 1107(a) and 1108.<sup>3</sup>

3. On May 14, 2020, the Debtors filed their Plan.

4. On June 3, 2020, Debtors filed the Assumption Notice.

5. Prior to the Petition Date, TierPoint and Debtor entered into six (6) master agreements (the "Master Agreements"), specifically described as follows:

- a. *TierPoint Master Services Agreement* between TierPoint, LLC and Debtor BOB, LLC;
- b. *Equipment Co-Location Agreement* between TierPoint Oklahoma, LLC and Debtor EarthLink Carrier, LLC;
- c. *Hosted Solutions Online Master Services Agreement*, as amended from time to time, between TierPoint Hosted Solutions, LLC (f/k/a Windstream Hosted Solutions, LLC) and Debtor Broadview Networks, Inc.;
- d. *Windstream Hosted Solutions Online Master Services Agreement* between TierPoint Hosted Solutions, LLC (f/k/a Windstream Hosted Solutions, LLC) Debtor Allwork Corp.;
- e. *Co-Location License Agreement* between TierPoint Oklahoma, LLC (f/k/a Perimeter Technology Center LLC) and Debtor Oklahoma Windstream, LLC; and
- f. *Data Center Services Agreement* with between TierPoint, LLC and Debtor Windstream Communications, LLC.

6. The Assumption Notice lists a "Master Agreement dated 12/18/2015"<sup>4</sup> between TierPoint, LLC and Debtor Windstream Communications, LLC with a \$0 cure amount listed. The Assumption Notice subsequently lists one (1) "Sales order quote" between TierPoint, LLC and no debtor counterparty, one (1) "executory contract" between TierPoint Oklahoma, LLC and Oklahoma Windstream, LLC, five (5) "executory contracts" between TierPoint, LLC and BOB, LLC, two (2) "executory contracts" between TierPoint, LLC and Broadview Networks, LLC,

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<sup>3</sup> Unless otherwise specified, all statutory references to "Section" are to 11 U.S.C. §§ 101 et seq. (the "Bankruptcy Code").

<sup>4</sup> Presumably the Assumption Notice intends to refer to the *Data Services Center Agreement* between TierPoint, LLC and Debtor Windstream Communications, LLC which is also dated 12/18/2015.

ninety-three (93) “executory contracts” between TierPoint, LLC and Windstream Communications, LLC, and one (1) “executory contracts” between TierPoint, LLC and Windstream KDL, LLC (collectively, “Debtors’ Contract List”). Each purported executory contract on Debtors’ Contract List lists “see above” in the “Cure Amount” column. Further, Debtor lists an alphanumeric code beside each contract on Debtors’ Contract List that has no discernable meaning to TierPoint.

### **LIMITED OBJECTION TO ASSUMPTION**

7. As a threshold issue, TierPoint objects to Debtors’ attempt to assume the purported contracts on Debtors’ Contract List as it is unclear which of the Master Agreements, if any, Debtor is attempting to assume pursuant to its Plan. While Debtors only references one “master agreement” in the Assumption Notice, the Assumption Notices references a variety of counterparties and over one hundred (100) purported executory contracts. Debtors should be required to specifically define which of the six (6) Master Agreements, if any, Debtors are seeking to assume.

8. As previously indicated, no executory contracts besides the aforementioned Master Agreements exist between the parties. To the extent applicable, and as Debtors have listed over one hundred (100) purported executory contracts when only the six (6) Master Agreements exist, TierPoint further objects to Debtors’ attempt to assume individual sales orders, open invoices, sub-agreements, etc., that may exist pursuant to one or more of the Master Agreements as such are not stand-alone executory contracts that can be assumed without assuming the related master agreement. *See, e.g., In re Buffets Holdings, Inc.*, 387 B.R. 115 (Bankr. D. Del. 2008).

**CURE OBJECTION**

9. Section 365(b) provides in pertinent part as follows:

(b)(1) 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.

11 U.S.C. § 365(b)(1).

10. Section 365(b)(1) includes compensation for sums incurred for attorneys' fees and expenses. The Master Agreements provide for recovery of attorneys' fees and expenses. TierPoint hereby objects to assumption of any contract with TierPoint absent payment of the relevant attorneys' fees and expenses.

11. As of the date of this Objection, TierPoint objects to the cure amount proposed for the Agreement included in Debtors' Assumption Notice (the "Proposed Cure Amounts"). TierPoint herein reserves the right to file supplementary cure objections.

12. Notwithstanding the lack of clarity in which of the Master Agreements, if any, Debtors are attempting to assume through the Plan, the Proposed Cure Amount is understated, as of the date of this Objection, as indicated in the below table:

**TABLE 1:**

<b>Debtor Proposed Cure Amount<sup>5</sup></b>	<b>Master Agreement</b>	<b>Master Agreement “Cure Amount”<sup>6</sup></b>
\$0	<i>TierPoint Master Services Agreement</i> between TierPoint, LLC and Debtor BOB, LLC	\$11,882.94
\$0	<i>Equipment Co-Location Agreement</i> between TierPoint Oklahoma, LLC and Debtor EarhLink Carrier, LLC	\$20,975.00
\$0	<i>Hosted Solutions Online Master Services Agreement</i> , as amended from time to time, between TierPoint Hosted Solutions, LLC (f/k/a Windstream Hosted Solutions, LLC) and Debtor Broadview Networks, Inc.	\$0.00
\$0	<i>Windstream Hosted Solutions Online Master Services Agreement</i> between TierPoint Hosted Solutions, LLC (f/k/a Windstream Hosted Solutions, LLC) Debtor Allwork Corp.	\$0.00
\$0	<i>Co-Location License Agreement</i> between TierPoint Oklahoma, LLC (f/k/a Perimeter Technology Center LLC) and Debtor Oklahoma Windstream, LLC	\$8,100.00
\$0	<i>Data Center Services Agreement</i> with between TierPoint, LLC and Debtor Windstream Communications, LLC	\$499,399.97

<sup>5</sup> As noted, Debtor lists “see above” in the Cure Amount column for all but the “Master Agreement dated 12/18/2015” between TierPoint, LLC and Debtor Windstream Communications, LLC which lists a cure amount of \$0. For ease of reference, it is assumed Debtor believes there is no cure owing for whatever executory contracts it is attempting to assume in its Plan.

<sup>6</sup> The Cure Amounts specified in this chart do not reflect any amounts that will become due or be invoiced on or after June 16, 2020, and TierPoint reserves all of its rights with respect thereto. Further, the Cure Amounts in the chart do not include attorneys’ fees which are also due and owing as cure and the rights thereto are expressly reserved herein,

13. TierPoint further objects to the assumption of any of the Masters Agreements absent payment of all Cure Amounts owed thereunder from the date of this Objection through the effective date of assumption, including any amounts that will become due or be invoiced on or after June 16, 2020 (including, but not limited to, additional amounts, not yet known, that accrued following the date of this Objection), as well as attorneys' fees and costs.

### **JOINER**

14. In addition to the foregoing, TierPoint further joins in the objections filed by the Debtors' other counterparties to the extent that such objections are not inconsistent with the relief requested in this Objection.

### **RESERVATION OF RIGHTS**

15. TierPoint hereby reserves its rights to make such other and further objections as may be appropriate to the Master Agreements.

### **CONCLUSION**

16. For the reasons set forth above, TierPoint respectfully requests that this Court (i) sustain this Objection; (ii) require that any order authorizing the assumption of any TierPoint agreement specify which Master Agreements are being assumed, (iii) require Debtors to pay all Cure Amounts as listed herein on or prior to the assumption of the corresponding Master Agreement, (iv) pay all amounts accrued but not yet billed following June 16, 2020; and (v) grant TierPoint such further relief as it deems proper."

Date: June 17, 2020  
New York, New York

Respectfully Submitted:

HUSCH BLACKWELL LLP

/s/Marshall C. Turner

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*Counsel to TierPoint, LLC, et al.*

**CERTIFICATE OF SERVICE**

Marshall C. Turner hereby certifies that on this the 17<sup>th</sup> day of June, 2020, a true a correct copy of the *Limited Objection of Tier Point, LLC, et al. to Debtors' First Amended Joint Chapter 11 Plan of Reorganization of Windstream Holdings, Inc., et al. and Notice of Filing of Plan Supplement* was served upon the following parties by the following means:

Windstream Holdings, Inc. via first class mail  
4001 North Rodney Parham Road  
Little Rock, Arkansas 72212  
Attn: Kristi M. Moody

Kirkland & Ellis, LLP via first class mail  
601 Lexington Avenue  
New York, New York 10022-4611  
Attn: Stephen Hessler, P.C.  
Attn: Marc Kieselstein, P.C.

Kirkland & Ellis, LLP via first class mail  
300 North LaSalle  
Chicago, Illinois 60654  
Attn: Ross M. Kwasteniet, P.C.  
Attn: Brad Weiland  
Attn: John R. Luze

Morrison & Foerster LLP via first class mail  
250 West 55th Street  
New York, New York 10019  
Attn: Lorenzo Marinuzzi  
Attn: Todd M. Goren  
Attn: Jennifer L. Marines  
Attn: Erica J. Richards

Office of the United States Trustee via first class mail  
For the Southern District of New York  
201 Varick Street, Suite 1006  
New York, New York 10014  
Attn: Paul K. Schwartzburg

Chambers Copy:

U. S . Bankruptcy Court via first class mail  
Southern District of New York  
1 Bowling Green  
New York, New York 10004

**All other parties receiving ECF Notice in this case.**

/s/ Marshall C. Turner

Marshall C. Turner