

AUDREY STRAUSS

Acting United States Attorney for the
Southern District of New York

By: DANIELLE J. LEVINE

86 Chambers Street, 3rd Floor

New York, New York 10007

Tel.: (212) 637-2689

E-mail: danielle.levine@usdoj.gov

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

In re:

WINDSTREAM HOLDING, INC., *et al.*,¹

Reorganized Debtors.

Case No. 19-22312 (RDD)

Chapter 11

(Jointly Administered)

**MOTION BY THE UNITED STATES OF AMERICA FOR ALLOWANCE OF
UNLIQUIDATED ADMINISTRATIVE CLAIM**

The United States of America (the “**United States**”), acting on behalf of the Federal Communications Commission (“**FCC**”), files this motion for an order, substantially in the form attached hereto as Exhibit A, granting the allowance of the FCC’s unliquidated administrative claim. In support of this motion, on information and belief based on information obtained and provided by the FCC in the discharge of its regulatory duties and as attested in the accompanying declaration of Josh Zeldis (“**Zeldis Decl.**”), the United States respectfully represents as follows:

¹The 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.



INTRODUCTION

1. The FCC requires that licensees or applicants for an FCC authorization complete environmental and historic preservation reviews, prior to any construction of a proposed wireless facility, so that the Commission may ascertain whether the proposed facility might adversely affect the environment or a historic property. Failure to undertake such reviews may pose a risk of adverse effects on the environment or historic properties. The FCC is investigating (i) whether Windstream Holdings II, LLC dba Windstream Communications (“**Windstream**”) one of the above-captioned reorganized debtors (the “**Debtors**”) committed post-petition violations of FCC regulations (specifically, 47 C.F.R. §§ 1.1307 and 1.1312) in connection with Windstream’s construction of two wireless telecommunications facilities before completing required environmental and historic preservation reviews; and (ii) whether the FCC has a right to recover against Windstream in connection with any such violation. Prior to filing this motion, the FCC engaged in discussions with the Debtors to attempt to resolve this matter, but the parties have not been able to reach a resolution prior to the deadline set in these cases for the filing of administrative claims. Accordingly, the United States files this motion before the expiration of that deadline to preserve its rights, although it does not waive the argument that the FCC’s right to recover may be excluded from the definition of “Claim.”

BACKGROUND

2. On February 25, 2019 (the “**Petition Date**”), the Debtors commenced their respective cases under chapter 11 of the Bankruptcy Code. Subsequent to the Petition Date, the Debtors continued to operate their businesses as debtors-in-possession.

3. On June 26, 2020 the Court entered an order confirming the Debtors’ plan of reorganization (the “**Plan**”) [D.I. 2243]. The Plan became effective on September 21, 2020, and

pursuant to the Plan, the deadline to file administrative claims was set as October 21, 2020 [D.I. 2527].

4. The FCC exercises its regulatory authority pursuant to the Communications Act of 1934 (as amended, the “**Communications Act**”) which is codified in Title 47 of the United States Code. Title V of the Communications Act, 47 U.S.C. §§ 501, *et seq.* in particular grants the FCC power to enforce its rules against any parties who commit violations.

5. Certain of the Debtors, including Windstream, are FCC licensees and offer telecommunications services. *See Zeldis Decl.* ¶ 3. Such Debtors operate subject to the Communications Act and FCC rules and regulations.

6. After the Petition Date, in late 2019, Windstream engaged a contractor to construct certain wireless facilities in Nebraska City, Nebraska, and Harrison, Arkansas. In connection with these activities and consistent with FCC regulations, Windstream solicited, among other things, the views of appropriate tribal representatives. *See id.* ¶ 4. In response, these tribes requested onsite monitoring of construction during all ground disturbance activity. *See id.*

7. In December 2019, the FCC’s Wireless Telecommunications Bureau (“**WTB**”) received a statement from Windstream reporting that despite telling its contractor not to begin construction without a site monitor present, construction activities had occurred at the Arkansas and Nebraska locations without the onsite monitoring requested by the affected tribes. *See id.* ¶ 5. The Spectrum Enforcement Division (“**SED**”) of the FCC’s Enforcement Bureau subsequently opened an investigation into these incidents. *See id.*

8. In connection with this investigation, the FCC and the Debtors entered into a tolling agreement to toll the relevant statute of limitations and also engaged in settlement discussions surrounding the alleged violations. *See id.* ¶ 6.

9. If the parties are unable to reach a resolution and the FCC's investigation determines that a violation of FCC rules occurred, then the violation may subject one or more Debtors to monetary fines, penalties, and/or forfeiture. *See, e.g.*, 47 U.S.C. § 501 and 503 and 47 C.F.R. § 1.80; *see also* Zeldis Decl. ¶ 7. However, until the FCC concludes its investigation, determines that a violation occurred, and ultimately issues a notice of apparent liability and forfeiture order, if appropriate, any "Claim" arising from a post-petition violation is contingent and unliquidated.²

RELIEF REQUESTED

10. The United States requests that the Court allow the FCC's unliquidated administrative claim (to the extent it is a "Claim").

11. Under the FCC's environmental rules, applicants and licensees are required to assess whether proposed facilities may significantly affect the environment. *See* 47 C.F.R. § 1.1307. 47 C.F.R. § 1.1307(a) addresses facilities that may significantly affect the environment, including those that: (a) affect threatened or endangered species or their critical habitats, or are likely to jeopardize proposed threatened or endangered species, or destroy or adversely modify proposed critical habitats; (b) may affect districts, sites, buildings, structures or objects that are listed, or eligible for listing, in the National Register; (c) may affect Native American religious sites; or (d) will involve significant change in surface features.³ In considering potential effects on historic properties, 47 C.F.R. § 1.1307(a)(4) requires applicants to follow the prescribed

² While the claim is unliquidated, section 503(b)(2) of the Communications Act and 47 C.F.R. § 1.80(b) authorize the FCC to assess a forfeiture against the Debtors of up to \$160,000 for a single act or failure to act.

³ 47 C.F.R. § 1.1307(a). National Register refers to the National Register of Historic Places, which is maintained by the Secretary of the Interior's Office of the Keeper of the National Register. 47 C.F.R. Pt. 1, App. C, Section II. A. 10.

procedures set forth in the rules of the Advisory Council on Historic Preservation,⁴ as modified by the Nationwide Programmatic Agreement for the Collocation of Wireless Antennas⁵ and the Nationwide Programmatic Agreement Regarding the Section 106 National Historic Preservation Act Review Process (NHPA).⁶ 47 C.F.R. § 1.1312 makes this obligation apply to facilities for which no FCC authorization prior to construction is required. As described above, the FCC's investigation into whether Windstream has violated these regulations is ongoing.

12. Section 503 of the Bankruptcy Code provides for the allowance of administrative expenses for, among other reasons, "the actual, necessary costs and expenses of preserving the estate" Additionally, "courts have accorded administrative priority to certain claims to further the goal of environmental protection." *In re Old Carco LLC*, 424 B.R. 633, 643 (Bankr. S.D.N.Y. 2010) (citing *In re N.P. Min. Co., Inc.*, 963 F.2d 1449, 1458 (11th Cir. 1992) (relying on 28 U.S.C. § 959(b) in support of allowing a post-petition fine as an administrative expense); *see also In re Motel Investments, Inc.*, 172 B.R. 105 (Bankr. M.D. Fla. 1994) (holding that post-petition penalties imposed by state environmental protection agency allowable as administrative expenses of the estate). Accordingly, the FCC's unliquidated claim which is based upon its investigation into alleged environmental violations is entitled to allowance as an administrative expense claim.

⁴ 36 C.F.R. Pt. 800.

⁵ 47 C.F.R. Pt. 1, App. B. *See Wireless Telecommunications Bureau Announces Execution of Programmatic Agreement with respect to Collocating Wireless Antennas on Existing Structures*, Public Notice, 16 FCC Rcd 5574 (WTB 2001), *recons. denied*, 20 FCC Rcd 4084 (WTB 2005).

⁶ 47 C.F.R. Pt. 1, App. C; *see Nationwide Programmatic Agreement Regarding the Section 106 National Historic Preservation Act Review Process*, Report and Order, 20 FCC Rcd 1073 (2004), *clarified*, 20 FCC Rcd 17995 (2005), *aff'd*, *CTIA-The Wireless Ass'n. v. FCC*, 466 F.3d 105 (D.C. Cir. 2006) (*NPA Report and Order*); *see also Implementation of State and Local Governments' Obligation to Approve Certain Wireless Facility Modification Requests Under Section 6409(a) of the Spectrum Act of 2012*, WT Docket No. 19-250, Declaratory Ruling and Notice of Proposed Rulemaking, FCC 20-75, 24-27, paras. 45-50 (2020) (an applicant or licensee is not required to file an environmental assessment if a proposed facility may have an adverse effect on the environment, provided that the FCC and the applicant or licensee enters into a memorandum of agreement to mitigate the effects of the proposed facility).

Ultimately the amount of the claim will be liquidated through a consensual resolution with the Debtors or the imposition of a penalty pursuant to FCC regulations.

13. Without waiving any argument that any penalty imposed as the result of the FCC's investigation would be excluded from the definition of "Claim" under the confirmed plan and 11 U.S.C. § 101(5), the United States files this motion to preserve its rights in the event that (a) the FCC determines that a post-Petition Date violation occurred, and (b) the FCC's right to recover against one or more Debtors is within the definition of "Claim." If a violation occurred and if it is a "Claim," then the FCC's right to recover should be an allowed administrative claim.⁷

Accordingly, the United States requests allowance of the FCC's administrative claim and such other and further relief as is equitable and just.

Dated: October 21, 2020
New York, New York

Respectfully submitted,

AUDREY STRAUSS
Acting United States Attorney for the
Southern District of New York

By: /s/ Danielle J. Levine
DANIELLE J. LEVINE
Assistant United States Attorney
86 Chambers Street, 3rd Floor
New York, New York
Telephone: 212-637-2689
E-mail: danielle.levine@usdoj.gov

⁷ Under the Debtor's Plan, all non-obligor general unsecured creditors are entitled to payment in full on their claims or reinstatement. Plan, Art.III.B.7. Accordingly, regardless of priority, any claim asserted by the FCC is entitled to payment in full on account of its claim.

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

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

**DECLARATION OF JOSH ZELDIS IN SUPPORT OF MOTION BY THE UNITED
STATES OF AMERICA FOR ALLOWANCE OF
UNLIQUIDATED ADMINISTRATIVE CLAIM**

I, Josh Zeldis, pursuant to 28 U.S.C. § 1746, declare as follows:

1. My current position is Attorney Advisor in the Spectrum Enforcement Division (“SED”) of the Enforcement Bureau of the Federal Communications Commission (the “FCC”).

2. I am familiar with SED’s investigation into possible violations of FCC rules by Windstream Holdings II, LLC dba Windstream Communications (“Windstream”) one of the above-captioned debtors (the “Debtors”). In support of the FCC’s motion for an administrative claim, I am providing the information below to best of my knowledge and based upon information and belief.

3. Windstream is an FCC licensee that offers certain telecommunications services.

4. In late 2019, Windstream engaged a contractor to construct certain wireless facilities in Nebraska City, Nebraska, and Harrison, Arkansas. In connection with these activities, Windstream solicited, among other things, the views of tribal representatives. In response, these tribes requested onsite monitoring of construction during all ground disturbance activity.

¹The 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.

5. In December 2019, the FCC's Wireless Telecommunications Bureau ("WTB") received a statement from Windstream reporting that despite telling its contractor not to begin construction without a site monitor present, construction activities had occurred at the Arkansas and Nebraska locations without the onsite monitoring requested by the affected tribes. SED subsequently opened an investigation into these incidents.

6. In connection with this investigation, the FCC and the Debtors entered into a tolling agreement to toll the relevant statute of limitations and also engaged in settlement discussions surrounding the alleged violations.

7. If the parties are unable to reach a resolution and the FCC's investigation determines that a violation of FCC rules occurred, then the violation may subject one or more of the Debtors to monetary fines, penalties, and/or forfeiture.

I declare under penalty of perjury that the foregoing is true and correct.

Executed in West River, Maryland on October 21, 2020.



Josh Zeldis
Attorney Advisor
Spectrum Enforcement Division
Enforcement Bureau
Federal Communications Commission

EXHIBIT A

Proposed Form of Order

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

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

**ORDER GRANTING MOTION BY THE UNITED STATES OF AMERICA FOR
ALLOWANCE OF UNLIQUIDATED ADMINISTRATIVE CLAIM**

*The Motion by the United States of America for Allowance of Unliquidated
Administrative Claim* is hereby GRANTED.

THE HONORABLE ROBERT D. DRAIN
United States Bankruptcy Judge

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.

AUDREY STRAUSS

Acting United States Attorney for the
Southern District of New York

By: DANIELLE J. LEVINE

86 Chambers Street, 3rd Floor

New York, New York 10007

Tel.: (212) 637-2689

E-mail: danielle.levine@usdoj.gov

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

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

**NOTICE OF HEARING ON THE
MOTION BY THE UNITED STATES OF AMERICA
FOR ALLOWANCE OF UNLIQUIDATED ADMINISTRATIVE CLAIM**

PLEASE TAKE NOTICE that a hearing on *the United States of America's Motion for Allowance of Unliquidated Administrative Claim* (the "**Motion**"), filed October 21, 2020, will be conducted on November 19, 2020, at 10:00 a.m. ET, before the Honorable Robert D. Drain, 300 Quarropas Street, White Plains, New York 10601.

If no objection is filed with the Clerk of the Bankruptcy Court on or before **November 12, 2020**, with a copy served upon undersigned counsel, then the court may enter an order granting the motion without further notice or hearing.

¹The 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.

Dated: October 21, 2020
New York, New York

Respectfully submitted,

AUDREY STRAUSS
Acting United States Attorney for the
Southern District of New York

By: /s/ Danielle J. Levine
DANIELLE J. LEVINE
Assistant United States Attorney
86 Chambers Street, 3rd Floor
New York, New York
Telephone: 212-637-2689
E-mail: danielle.levine@usdoj.gov

AUDREY STRAUSS

Acting United States Attorney for the
Southern District of New York

By: DANIELLE J. LEVINE

86 Chambers Street, 3rd Floor

New York, New York 10007

Tel.: (212) 637-2689

E-mail: danielle.levine@usdoj.gov

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

In re:

WINDSTREAM HOLDING, INC., *et al.*,¹

Reorganized Debtors.

Case No. 19-22312 (RDD)

Chapter 11

(Jointly Administered)

CERTIFICATE OF SERVICE

I, Danielle J. Levine, an Assistant United States Attorney in the Southern District of New York, hereby certify that on October 21, 2020, a true and correct copy of (1) the United States of America's for Allowance of Unliquidated Administrative Claim (the "**Motion**"); (2) the Declaration of Josh Zeldis in Support of the Motion; and (3) a Notice of Hearing of the Motion were served through the Court's CM/ECF system on all participants in the case as registered CM/ECF users.

Dated: October 21, 2020
New York, New York

/s/ Danielle J. Levine

Danielle J. Levine

¹The 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.