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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)
)	
Debtors.)	(Jointly Administered)
_____)	

**CHARTER COMMUNICATIONS OPERATING, LLC'S OBJECTION TO
 NOTICE OF FILING OF NINTH AMENDED PLAN SUPPLEMENT AND
 NOTICE OF (A) EXECUTORY CONTRACTS TO BE ASSUMED BY THE
 REORGANIZED DEBTORS PURSUANT TO THE PLAN, (B) CURE AMOUNTS
AND (C) RELATED PROCEDURES IN CONNECTION THEREWITH**



On November 4, 2020, Debtors filed their *Notice of Filing of Ninth Amended Plan Supplement* (Dkt. No. 2654) and served a *Notice of (A) Executory Contracts to be Assumed by the Reorganized Debtors pursuant to the Plan, (B) Cure Amounts and (C) Related Procedures in Connection Therewith*. Charter Communications Operating, LLC (CCO) objects to the proposed cure amounts stated there in and affirmatively requests that this Court enter an order (1) determining that the cure obligations for the assumption of the Spectrum Business Value Added Reseller Agreement dated April 11, 2018 (VAR Agreement) and the Carrier Master Service Agreement dated December 14, 2018 (Enterprise Agreement) (collectively, the “Charter Contracts”) each entered into between CCO and Windstream Services, LLC (Windstream Services), on behalf of itself and all of its affiliated companies (collectively, “Debtors”) equal to approximately \$13,696,000 in pre-petition obligations, plus interest, plus any post-petition obligations not paid in the ordinary course, plus interest on post-petition obligations, and minus any payments or credits to be applied (the “Cure Obligations”) and (2) directing Debtors to pay the Cure Obligations.

BACKGROUND

1. On February 25, 2019 (the “Petition Date”), Windstream Services, Windstream Holdings, Inc., and each of the other 203 affiliated debtors filed voluntary petitions for relief under Chapter 11 of the Bankruptcy Code.

2. Prior to the Petition Date, Debtor Windstream Services, on behalf of itself and its affiliates, entered into the Charter Contracts with CCO. These Charter Contracts are identified on Windstream Services’ Amended Schedule G, Lines 2.601 and 2.602 (Case No. 19-22400, Dkt. No. 7).

3. Since the Petition Date, Debtors continued to operate their businesses and to act as debtors-in-possession.

4. Since the Petition Date, CCO continues to provide services under the Charter Contracts, and Debtors continue to receive the services provided by CCO.

5. On July 12, 2019, CCO filed thirty-eight proofs of claim in thirty-six debtors' bankruptcy cases describing the pre-petition obligations of each of those Debtors under the Charter Contracts (Proofs of Claim). *See* Claims 5731-5740, 5747-5755, 5758-5769, 5780, 5786, 5790-5793, 5830. Debtors' pre-petition obligations under the 38 claims owed pursuant to the Charter Contracts totaled \$13,672,143.83.¹

6. The Court approved the *Disclosure Statement for the First Amended Joint Chapter 11 Plan of Reorganization of Windstream Holdings, Inc. et al.*, pursuant to Chapter 11 of the Bankruptcy Code and the procedures for confirmation (Dkt. No. 1813) of the *First Amended Joint Chapter 11 Plan of Reorganization of Windstream Holdings, Inc. et al., Pursuant to Chapter 11 of the Bankruptcy Code* (Dkt. No. 1812) (the Plan) and for assumption of executory contracts (Dkt. No. 1814). The procedures permitted the Debtors to file a list of assumed contracts (with proposed

¹ Instead of paying the general unsecured claims evidenced by the Proofs of Claim filed by CCO (which are "deemed disallowed and expunged" upon assumption), assumption carries with it the new obligation on Debtors and the Reorganized Debtors to pay the Cure Obligations necessary to cure all defaults and to compensate CCO for its losses under the Charter Contracts as of the Effective Date. The Plan, specifically, provides as follows:

Assumption of any Executory Contract or Unexpired Lease pursuant to the Plan or otherwise shall result in the full release and satisfaction of any Claims or defaults, whether monetary or nonmonetary, including defaults of provisions restricting the change in control or ownership interest composition or other bankruptcy-related defaults, arising under any Assumed Executory Contract or Unexpired Lease at any time before the date that the Debtors assume such Executory Contract or Unexpired Lease. The portions of any Proofs of Claim filed with respect to an Executory Contract or Unexpired Lease that has been assumed shall be deemed disallowed and expunged, without further notice to or action, order, or approval of the Bankruptcy Court, and any remaining portions of such Proofs of Claim shall remain unaffected unless otherwise specifically objected to.

Plan, § V.C.

cure amounts pursuant to 11 U.S.C. § 365(b)(1)) and a list of rejected contracts as part of a plan supplement (*see* Dkt. No. 1814). The deadline to object to the Plan was June 17, 2020.

7. On June 3, 2020, Debtors filed their initial Plan Supplement (Dkt. No. 1973), in which they listed the contracts that would be assumed with proposed cure amounts. Debtors listed no executory contracts with CCO on the assumption list in the Plan Supplement. On June 10, 2020, Debtors filed their First Amended Plan Supplement (Dkt. No. 2010), in which they listed contracts that would be rejected. In the First Amended Plan Supplement, Debtors listed no executory contracts with CCO on the rejection list.

8. Because Debtors did not list the Charter Contracts on either the assumption schedule or the rejection schedule prior to the confirmation hearing, CCO filed an objection on June 16, 2020, to preserve its rights with respect to any Cure Obligations that would have to be paid if the Charter Contracts were assumed (*see* Dkt. No. 2059).

9. On June 26, 2020, the Court entered its *Findings of Fact, Conclusions, of Law, and Order Confirming the First Amended Joint Chapter 11 Plan of Reorganization of Windstream Holdings, Inc., et al., pursuant to Chapter 11 of the Bankruptcy Code* (the Confirmation Order) (Dkt. No. 2243). In order to resolve CCO's Plan objection for the time being, clarify the parties' positions, and ensure that CCO would not be prejudiced with respect to the Debtors' Cure Obligations, CCO and Debtors presented—and the Court incorporated—reservation language into the Confirmation Order (Dkt. No. 2243, ¶ 95).²

² The Confirmation Order provided as follows:

Notwithstanding any provision of the Plan to the contrary regarding assumption of executory contracts and payment of cure obligations, if the Debtors decide to assume any executory contract with Charter Communications Operating, LLC ("Charter" and such contracts collectively, the "Charter Contracts"), neither the confirmation of the Plan nor the Debtors' decision to defer listing the Charter Contracts on the Assumed Executory Contract/Unexpired Lease Schedule or the Rejected Executory Contracts and Unexpired Leases Schedule shall prejudice the rights of Charter

10. From time to time, the Plan Supplement has since been amended and/or supplemented (*see* Dkt. Nos. 2039, 2199, 2303, 2354, 2422, 2480, and 2522). Some of these amendments to the Plan Supplement have altered the assumption and rejection schedules regarding treatment of executory contracts by the Debtors. The Charter Contracts was not listed on the Plan Supplement or any amendment thereto until the Debtors filed the *Notice of Filing of Ninth Amended Plan Supplement* (Dkt. No. 2654) on November 4, 2020.

11. On September 21, 2020, the Debtors filed a Notice of Effective Date providing notice to all parties that their plan was effective on September 21, 2020 (Dkt. No. 2527).

12. On October 21, 2020, CCO filed a motion requesting that the Court determine the cure obligations owed by the Debtors to CCO for assumption of the Charter Contracts equaled \$18,862,342.33 (which was the pre- and post-petition balance calculated as of October 7, 2020), allow the Cure Obligations as an administrative expense claim, and directing the Debtors to pay the Cure Obligations to CCO (Dkt. No. 2605) (the “Motion for Administrative Expense”)³ along with the Declaration of Mark Holmes (filed under seal).

13. On November 4, 2020, Debtors filed a *Notice of Filing Ninth Amended Plan Supplement* (Dkt. No. 2654), thereby indicating their affirmative intent to assume the Charter

(a) to object to any cure amount proposed by the Debtors if the Debtors propose a cure amount; (b) to assert a cure amount owed on the Charter Contracts; and (c) to enforce the obligations of the Debtors or, as applicable, the Reorganized Debtors under any assumed Charter Contract, including the obligation to satisfy any cure amount owed on any such assumed Charter Contract; provided, that the foregoing reservation shall not prejudice the rights of the Debtors to assume or reject the Charter Contracts in accordance with 11 U.S.C. §§ 365, 1123 and the Plan or to contest any cure amount proposed by Charter, including the “Cure Claim” asserted by Charter in Dkt. No. 2059.

Dkt. No. 2243, ¶ 95.

³ The issues to be resolved regarding the Cure Obligations for assumption for the Charter Contracts under the Ninth Amended Plan Supplement are the same as the issues presented in the Motion for Administrative Expense. The Motion for Administrative Expense is being withdrawn and the issues presented therein should be resolved in connection with the Ninth Amended Plan Supplement.

Contracts and proposing a cure amount of only \$1,643,717.97 for the VAR Agreement and \$4,098,377.88 for the Enterprise Agreement.

14. As previously discussed in the Motion for Administrative Expense, the balance actually owed by Debtors for the pre-petition services provided by CCO under the Charter Contracts is \$13,696,696,⁴ which includes a prorated pre-petition portion of the February 2019 obligation.

15. The balance owed for post-petition services provided by CCO to Debtors under the Charter Contracts through the Effective Date as of October 7, 2020, was \$2,407,733.00. It is anticipated that these obligations will be paid in the regular course, but to the extent they are not paid, Debtors are required to pay these obligations as part of the Cure Obligations. CCO will continue to apply post-petition payments and credits to the accounts as appropriate.

16. Accrued and unpaid interest on the pre- and post-petition obligations under the Charter Contracts as of October 7, 2020, was approximately \$3,036,591.53. Interest on unpaid obligations under the Charter Contracts continues to accrue.

ARGUMENT

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.

⁴ The pre-petition obligations are subject to the application of certain credits in the amount of \$278,678, bringing the pre-petition obligations on the Charter Contracts to \$13,418,018.00.

18. Section 365(b) requires a debtor to cure defaults as a precondition of assuming an executory contract. *See In re Stoltz*, 315 F.3d 80, 94 (2d Cir. 2002). In other words, a debtor cannot assume an executory contract without first curing defaults (or providing assurance that the default will be cured promptly).

19. It is also well established that a contract cannot be partially assumed or rejected. Rather, Section 365 of the Bankruptcy Code requires a debtor to either reject or assume a contract in full, which includes all of the benefits and burdens of that contract. *See N.L.R.B. v. Bildisco and Bildisco*, 465 U.S. 513, 531 (1984); *AGV Prods., Inc. v. Metro–Goldwyn–Mayer, Inc.*, 115 F.Supp.2d 378, 390–91 (S.D.N.Y. 2000) (citations omitted), *aff’d*, 37 Fed.Appx. 555 (2d Cir. 2002) (debtor cannot assume an executory contract in part and reject it in part); *In re Adelphia Bus. Sols., Inc.*, 322 B.R. 51, 55 (Bankr. S.D.N.Y. 2005); *In re Leslie Fay Cos., Inc.*, 166 B.R. 802, 808 (Bankr. S.D.N.Y. 1994). The cure requirement ensures that the non-debtor receives the benefit of its bargain. *See In re Joshua Slocum Ltd.*, 922 F.2d 1081, 1091 (3d Cir. 1990).

20. The obligation to cure defaults for assumption of an executory contract requires that the Court look to the terms of the contracts and to state law. In order to fully compensate the counterparty to the executory contracts being assumed, a debtor assuming contracts is required to pay interest and fees as provided in the contracts or under state law. *See In re J.W. Mays, Inc.*, 30 B.R. 769, 772 (Bankr. S.D.N.Y. 1983) (“Thus, to make the landlord herein whole pursuant to Section 365 of the Code, the debtor assuming the lease is required to make payment of interest on the pre-petition unpaid rent installments.”); *In re Hillsborough Holdings Corp.*, 126 B.R. 895, 898 (Bankr. M.D.Fla. 1991) (“interest is an actual pecuniary loss flowing directly from the admitted default of the Debtor . . . [and] it is a compensable item under § 365(b)(1)(B)”). *See also* NORTON BANKRUPTCY LAW AND PRACTICE (3rd ed.), § 46:30 (“If interest is provided for under applicable

nonbankruptcy law upon a default, interest must be paid as necessary to ‘compensate for actual pecuniary loss’ under Code § 365(b)(1)(B)’).

21. If Debtors desire to assume the Charter Contracts, they must cure all defaults under the Charter Contracts and compensate CCO for all losses.⁵ Without payment of the Cure Obligations, there can be no assumption of the Charter Contracts. While Debtors appear to understand and acknowledge this obligation to cure all defaults under the assumed Charter Contracts, the Debtors have understated the Cure Obligations that must be paid to assume the Charter Contracts.

22. The Cure Obligations under the VAR Agreement equaling approximately \$3,566,856 consists of (1) the pre-petition obligations under the VAR Agreement equaling \$2,462,288.45, (2) the post-petition obligations under the VAR Agreement equaling \$540,474.00, which includes prorated post-petition obligations for services provided from the Petition Date through the end of February and prorated post-petition obligations for service provided from September 1 through the Effective Date, (3) interest on the pre-petition obligations under the VAR Agreement equaling \$540,895.28 (4) interest on the post-petition obligations under the VAR Agreement equaling \$23,198.21.

⁵ The Plan requires Debtors or the Reorganized Debtors to pay cure claims:

The Debtors or the Reorganized Debtors, as applicable, shall pay Cure Claims, if any, on the Effective Date or as soon as practicable thereafter, or on such other terms as the parties to such Executory Contracts or Unexpired Leases may otherwise agree. Any Cure Claim shall be deemed fully satisfied, released, and discharged upon payment by the Debtors or the Reorganized Debtors of such Cure Claim

Plan, § V.C (emphasis added). This obligation to pay the Cure Obligations in full is not just expressly provided for in the Plan, but also required by the law. If Debtors fail to pay the Cure Obligations to CCO, CCO is entitled to administrative expense priority treatment—which are afforded the “highest priority” on the Debtors’ estate. *Bildisco*, 465 U.S. at 531–32 (“Should the debtor-in-possession elect to assume the executory contract, however, it assumes the contract cum onere, and the expenses and liabilities incurred may be treated as administrative expenses, which are afforded the highest priority on the debtor’s estate, 11 U.S.C. § 503(b)(1)(A).”) (internal citation omitted).

23. The Cure Obligations under the Enterprise Agreement equaling approximately \$15,295,846 consists of (1) the pre-petition obligations under the Enterprise Agreement equaling \$10,955,729.35, (2) the post-petition obligations under the Enterprise Agreement, which includes prorated post-petition obligations for services provided from the Petition Date through the end of February and prorated post-petition obligations for service provided from September 1 through the Effective Date, equaling \$1,867,259.00, (3) interest on the pre-petition obligations under the Enterprise Agreement equaling \$2,389,762.83, and (4) interest on the post-petition obligations under the Enterprise Agreement equaling \$82,735.21.

24. CCO continues to provide services under the Charter Contracts, so additional charges continue to accrue. Additional credits and payments, if any, will continue to be applied. Debtors and CCO have agreed to attempt to reconcile the differences in the cure amounts proposed by the Debtors and the Cure Obligations asserted by CCO. To the extent additional information comes to light in the process and to the extent additional payments or credits need to be applied, CCO reserves the right to supplement this response and/or amend the amounts asserted as Cure Obligations.

WHEREFORE, Charter Communications Operating, LLC requests that the Court enter an order (A) sustaining this objection of Charter Communications Operating, LLC to the notice of assumption and cure amounts; (B) determining the Cure Obligations owed by the Debtors to Charter Communications Operating, LLC for assumption of the Charter Contracts is \$18,862,342, (C) directing the Debtors to pay Charter Communications Operating, LLC \$18,862,342 to satisfy the Cure Obligations owed as a condition to assumption of the Charter Contracts; and (D) granting such other and further relief as is just and appropriate under the circumstances.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 18th day of November, 2020, I served a true and correct copy of *Charter Communications Operating, LLC's Objection to Notice of Filing of Ninth Amended Plan Supplement and Notice of (A) Executory Contracts to be Assumed by the Reorganized Debtors pursuant to the Plan, (B) Cure Amounts and (C) Related Procedures in Connection Therewith* via operation of the Court's Electronic Filing System upon all counsel of record in the bankruptcy case.

A copy of this objection will be sent on the 18th day of November, 2020, via electronic mail to counsel for the Debtor and by Federal Express to counsel for the Debtor, the Court, and the U.S. Trustee.

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