

**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK**

_____)	
In re:)	Chapter 11
)	
WINDSTREAM FINANCE, CORP., <i>et al.</i>,	)	Case No. 19-22397 (RDD)
)	
Debtors.	)	(Formerly Jointly Administered
	)	under Lead Case Windstream
_____	)	Holdings, Inc., 19-22312)
)	
WINDSTREAM HOLDINGS, INC., <i>et al.</i> ,)	
)	
Plaintiffs,	)	Adv. Pro. No. 19-08246
)	
vs.)	
)	
CHARTER COMMUNICATIONS, INC.)	
and CHARTER COMMUNICATIONS)	
OPERATING, LLC,)	
)	
Defendants.)	
_____)	

REPLY IN FURTHER SUPPORT OF MOTION TO APPROVE SUPERSEDEAS BOND



1. Defendants Charter Communications, Inc. and Charter Communications Operating, LLC (collectively, “Charter”) submit this reply in further support of *Charter’s Motion to Approve Amount of Supersedeas Bond* (Adv. Pro. Dkt. No. 336, the “Motion”) and in response to Plaintiffs’ *Objection to Charter’s Motion to Approve Supersedeas Bond* (Adv. Pro. Dkt. No. 339, the “Objection” or “Obj.”). For the avoidance of doubt, notwithstanding Charter’s Notice of Appeal (Adv. Pro. Dkt. No. 337), the Court retains jurisdiction over supplementary proceedings concerning its judgments. *Cessna Fin. Corp. v. Al Ghaith Holding Co. PJSC*, No. 15 CIV. 9857 (PGG), 2021 WL 603012, at *2 (S.D.N.Y. Feb. 16, 2021); *cf.* Fed. R. Bankr. P. 8007(a)(2) (motion for approval of bond provided to obtain a stay of judgment “may be made either before or after the notice of appeal is filed”).

2. As a threshold matter, Windstream “does not oppose a stay of this Court’s judgment” and the parties reached agreement on the “amount of the bond.” *Obj.* ¶ 3. Nevertheless, Windstream advances three objections to the proposed form of bond.¹ As discussed herein, Windstream’s objections should be overruled.

3. **First**, Windstream incorrectly asserts that Charter is seeking to have its proposed bond (the “Proposed Bond”) “cover both an appeal to the District Court *and* a future possible appeal to the [U.S. Court of Appeals,] Second Circuit.” *Obj.* ¶ 3 (emphasis in the original). Rather, the Proposed Bond merely would provide that it would not be payable in the event that the District Court or the Court of Appeals, in their discretion, determines to stay the effect of a putative affirmance pending consideration by the Court of Appeals.

¹ Charter’s proposed form of bond (“Proposed Bond”) is attached as **Exhibit A** hereto. Exhibit 2 to Windstream’s Objection shows the differences between Charter’s Proposed Bond and Windstream’s proposed bond.

4. Windstream misunderstands the Proposed Bond. As clearly stated in section “a” of the Proposed Bond, Charter (jointly and severally) and its surety, Federal Insurance Company, each “promise to pay” within thirty days of the judgment being affirmed “*by either of the Appellate Courts....*” Proposed Bond at 2, ¶(a) (emphasis added). Thus, subject only to a subsequent stay granted within such 30-day period, the Proposed Bond would be payable upon the District Court’s putative affirmance.

5. Absent a stay imposed by the District Court or Court of Appeals, nothing in the Proposed Bond *automatically* bars payment pending a further appeal to the Second Circuit by Charter. Rather, the Proposed Bond merely provides that the promise to pay is not triggered in the event that the putative affirmance *is stayed during the 30-day window pending further appeal*. Proposed Bond at 2 (conditioning section (a)’s triggering event upon such affirmance not being “stayed pending further appeal”). Charter agrees with Windstream that “if the District Court renders a decision that Charter wishes to appeal, Charter will need to obtain a new stay from the *District Court* [or the Court of Appeals] in order to stay the *District Court’s* adverse judgment.” Obj. ¶ 7 (emphasis in the original). The decision to stay, in this regard, will be the District Court’s (or the Second Circuit’s). Fed. R. Bankr. P. 8025(b); (c) (appellate court’s power not limited).

6. Windstream’s position, if accepted, would be unfair to Charter in the exercise of its appellate rights. In the event that the District Court’s putative decision in favor of Windstream is in fact stayed (by either the District Court under Fed. R. Bankr. P. 8025(b) or the Second Circuit pursuant to Fed. R. App. P. 8), the Proposed Bond should not be payable nevertheless as that would undercut the whole point of the stay. Indeed, Fed. R. Bankr. P. 8025(c) confirms this conclusion, providing that “[i]f the district court [] enters a judgment affirming an order, judgment, or decree of the bankruptcy court, a stay of the district court’s [] judgment automatically stays the bankruptcy

court's order, judgment, or decree *for the duration of the appellate stay.*" Fed. R. Bankr. P. 8025(c) (emphasis added).

7. It is inconsistent with the Bankruptcy Procedure Rules, and simply makes no sense, to provide a bond that is payable upon an affirmance, when the affirmance is stayed pending further appeal. To be certain, Charter is not asking this Court to stay any District Court decision and is not asking this Court to approve any bond as grounds for such a stay.

8. **Second**, notwithstanding Windstream's prior agreement to the amount of the Proposed Bond (*i.e.*, \$19.5 million), Windstream now argues that the "form of the bond ... does not cover the entire scope of this Court's judgment," Obj. ¶ 8, requesting that the bond cover its legal fees in defending Charter's appeal. This request should be denied. *See North Carolina v. Pearce*, 395 U.S. 711, 724 (1969) ("A court is without right to put a price on an appeal.") (cleaned up).

9. It is true that this Court determined Windstream was "entitled to damages in the amount of the reasonable attorneys' fees and expenses incurred because of Defendants' breach of the automatic stay under section 362(a)(3) of the Bankruptcy Code." Memorandum of Decision on Count VI (Contempt For Violation Of The Automatic Stay) and Count VII (Equitable Subordination) at 39 (granting damages based on outside counsel's fees and fees of expert witness) (Adv. Pro. Dkt. No. 332). But, these amounts are already encapsulated in the Court's judgment. This Court did *not* rule that *the prospective legal fees incurred by Windstream in defending any future appeal* were appropriate damages as a result of the stay violation found by this Court.

10. Local Rule 8007-1 reflects the lack of merit in Windstream's position. That rule provides that a supersedeas bond "shall be *in the amount of the judgment*, plus interest at a rate consistent with 28 U.S.C. § 1961, and \$250 to cover costs and such damages for delay as may be

awarded.” United States Bankruptcy Court Southern District of New York Local Rule 8007-1 (emphasis added). The rule simply does not provide for legal fees incurred in defending a subsequent appeal.

11. Nor do the cases cited by Windstream support its demand. Windstream cites *Poplar Grove Planting & Ref. Co. v. Bache Halsey Stuart, Inc.*, 600 F.2d 1189, 1191 (5th Cir. 1979) for the unremarkable notion that the amount of the bond should cover the “entirety of [the Court’s] judgment.” Obj. ¶ 8. That is not an issue here. As noted, the full amount of the Court’s judgment is covered by the Proposed Bond. Nowhere does *Poplar Grove* hold that an appellant must bond the expenses of an appellee defending against a forthcoming or pending appeal.²

12. Charter is statutorily afforded the right to appellate review of the Court’s judgment under 28 U.S.C. § 158. Moreover, Fed. R. Bankr. P. 7062 itself does not provide for the recovery of attorneys’ fees. *Bass v. First Pacific Networks, Inc.*, 219 F.3d 1052, 1054 (9th Cir. 2000) (“Importantly, neither Rule 65.1, nor Rule 62(d), under which the bond in the instant appeal was

² Nor does *Trans World Airlines, Inc. v. Hughes*, 515 F.2d 173 (2d Cir. 1975), concerning the “costs” of obtaining a letter of credit and providing audited financial statements pending appeal, in any respect support the proposition that an appellant should bond appellee’s legal fees in defending an appeal. Notably, however, Judge Timbers’s dissent is helpful in reference to the Supreme Court’s admonition that “[i]tems proposed by winning parties as costs should always be given careful scrutiny. Any other practice would be too great a movement in the direction of some systems of jurisprudence that are willing, if not indeed anxious, to allow litigation costs so high as to discourage litigants from bringing lawsuits, no matter how meritorious they might in good faith believe their claims to be.” *Id.* at 181 citing *Farmer v. Arabian American Oil Company*, 379 U.S. 227, 235 (1964).

The other cases cited by Windstream do not support its position. In *Murphy v. Arlington Cent. Sch. Dist. Bd. of Educ.*, No. 99 CIV. 9294 (CSH), 2003 WL 22048775, at *1 (S.D.N.Y. Sept. 2, 2003), the underlying judgment, like the judgment here, was premised on fees. *Id.* And yet the court does not anywhere bless the propriety of bonding an appellee’s legal fees in defending the appeal. *Jack Frost Lab’ys, Inc. v. Physicians & Nurses Mfg. Corp.*, No. 92 CIV. 9264 (MGC), 1996 WL 479245, at *1 (S.D.N.Y. Aug. 23, 1996) simply does not advance the analysis at all.

posted, provides for the recovery of attorney's fees, and both rules are silent on recovery of costs or damages.").

13. Even assuming that Windstream's legal fees incurred in defending the appeal could be charged to Charter, that determination should be made by an appellate court, if any court. Furthermore, the amount that Charter agreed to post through the Proposed Bond (\$19.5 million) exceeds the Court's actual judgment (\$19.18 million), thereby providing a cushion of bonded coverage in the event an appellate court were to determine such legal fees should be awarded over Charter's objection. For all of these reasons, Windstream's demand should be denied.

14. **Third**, and finally, Windstream's request to remove language providing for the unremarkable proposition that the Proposed Bond will not be payable for portions of the judgment that the appellate court *does not* affirm should also be rejected. Here, the parties are in conceptual agreement. The parties agree that the Proposed Bond is meant to provide surety for amounts that are affirmed (and only for amounts that are affirmed)—not to improve Windstream's position and provide payment for amounts that are, hypothetically, scaled back on appeal.

15. The parties also agree that, given that bonds are creatures of contract, clarity and unambiguity are the appropriate goals. In that vein, Charter believes the inclusion of the proviso clause "if the Judgment is affirmed only in part, then this Promise to Pay applies solely with respect to the portion that is affirmed" furthers the goals of clarity and does no harm to any party's interests. Proposed Bond at 2, ¶(a). The proviso should be included. It serves to reduce, at a minimum, confusion and unnecessary disputes, and at worst, the possibility that Windstream draws on a bond for amounts the appellate court holds are improper.

WHEREFORE, Defendants Charter Communications, Inc. and Charter Communications Operating, LLC respectfully request that this Court approve the form of the bond attached hereto,

fix the amount of the supersedeas bond at \$19,500,000.00, and granting any further relief it deems just and necessary.

Dated: New York, New York
May 14, 2021

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*Co-counsel for Defendants Charter
Communications, Inc. and Charter
Communications Operating, LLC*

Exhibit A

**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK**

_____)	
In re:	)	Chapter 11
)	
WINDSTREAM FINANCE, CORP., <i>et al.</i>,	)	Case No. 22397 (RDD)
)	
Debtors.	)	(Formerly Jointly Administered
	)	under Lead Case Windstream
	)	Holdings, Inc., 19-22312)
_____)	
)	
WINDSTREAM HOLDINGS, INC., <i>et al.</i> ,)	
)	
Plaintiffs,	)	Adv. Pro. No. 19-08246
)	
vs.)	
)	
CHARTER COMMUNICATIONS, INC.)	
and CHARTER COMMUNICATIONS)	
OPERATING, LLC,)	
)	
Defendants.)	
_____)	

SUPERSEDEAS BOND

Recitals

1. On April 15, 2021, the United States Bankruptcy Court for the Southern District of New York entered judgment (Adv. Dkt. 334) (the “Judgment”), on a joint and several basis, against Charter Communications, Inc. and Charter Communications Operating, LLC (together, the “Appellants”) and in favor of Windstream Holdings, Inc. (and the other 204 plaintiffs appearing on **Exhibit A**) (collectively, the “Plaintiffs”).

2 Appellants intend to file a notice of appeal with the bankruptcy clerk and to appeal the Judgment in favor of the Plaintiffs before the United States District Court for the Southern District of New York and/or the U.S. Court of Appeals for the Second Circuit (each, a “Appellate Court”). Appellants seek to stay enforcement of the Judgment pending determination of the appeal by the Appellate Courts.

Promise to Pay

Appellants (on a joint and several basis), as principals, and Federal Insurance Company, as surety, each undertake and promise to pay to the Plaintiffs the Judgment, including post-judgment interest at the applicable statutory rate pursuant to 28 U.S.C. § 1961, along with all costs incurred as a result of the stay and not as a result of prosecution of appeal, up to the sum of NINETEEN MILLION, FIVE HUNDRED THOUSAND, AND 0/100 DOLLARS (\$19,500,000.00) within thirty days of the occurrence of any of the following events, whichever is earliest:

- a. the Judgment is affirmed, in whole or in part (provided, that, if the Judgment is affirmed only in part, then this Promise to Pay applies solely with respect to the portion that is affirmed), by either of the Appellate Courts, which affirmance is not stayed pending further appeal, or
- b. the appeal is dismissed by either Appellate Court.

<p>For the principals:</p> <p>CHARTER COMMUNICATIONS, INC.</p> <p>By _____ _____ print _____ title</p> <p>Dated: _____</p> <p>CHARTER COMMUNICATIONS OPERATING, LLC</p> <p>By _____ _____ print _____ title</p> <p>Dated: _____</p>	<p>For the surety:</p> <p>FEDERAL INSURANCE COMPANY</p> <p>By _____ _____ print _____ title</p> <p>Dated: _____</p> <p>_____ address</p> <p>_____</p> <p>_____ tel.</p>
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APPROVED: _____, 2021

United States Bankruptcy Court
Southern District of New York

Exhibit A to Appellants' Supersedeas Bond

Windstream Holdings, Inc., et. al. Debtor List

Debtor Name	Case No.
Windstream Holdings, Inc.	19-22312
A.R.C. Networks, Inc.	19-22338
Allworx Corp.	19-22345
American Telephone Company LLC	19-22349
ARC Networks, Inc.	19-22362
ATX Communications, Inc.	19-22368
ATX Licensing, Inc.	19-22371
ATX Telecommunications Services of Virginia, LLC	19-22377
Birmingham Data Link, LLC	19-22382
BOB, LLC	19-22387
Boston Retail Partners, LLC	19-22392
BridgeCom Holdings, Inc.	19-22403
BridgeCom International, Inc.	19-22408
BridgeCom Solutions Group, Inc.	19-22428
Broadview Networks of Massachusetts, Inc.	19-22440
Broadview Networks of Virginia, Inc.	19-22454
Broadview Networks, Inc.	19-22456
Broadview NP Acquisition Corp.	19-22461
Buffalo Valley Management Services, Inc.	19-22463
Business Telecom of Virginia, Inc.	19-22466
Business Telecom, LLC	19-22469
BV-BC Acquisition Corporation	19-22471
Cavalier IP TV, LLC	19-22474
Cavalier Services, LLC	19-22313
Cavalier Telephone Mid-Atlantic, L.L.C.	19-22315
Cavalier Telephone, L.L.C.	19-22317
CCL Historical, Inc.	19-22319
Choice One Communications of Connecticut, Inc.	19-22322
Choice One Communications of Maine, Inc.	19-22324
Choice One Communications of Massachusetts, Inc.	19-22326
Choice One Communications of New York, Inc.	19-22329
Choice One Communications of Ohio, Inc.	19-22331
Choice One Communications of Pennsylvania, Inc.	19-22332
Choice One Communications of Rhode Island, Inc.	19-22335
Choice One Communications of Vermont, Inc.	19-22339
Choice One Communications Resale, L.L.C.	19-22341
Choice One of New Hampshire, Inc.	19-22344
Cinergy Communications Company of Virginia, LLC	19-22353
Conestoga Enterprises, Inc.	19-22356
Conestoga Management Services, Inc.	19-22358
Conestoga Wireless Company	19-22360
Connecticut Broadband, LLC	19-22363
Connecticut Telephone & Communication Systems, Inc.	19-22365

**Windstream Holdings, Inc., et. al.
Debtor List**

Debtor Name	Case No.
Conversent Communications Long Distance, LLC	19-22366
Conversent Communications of Connecticut, LLC	19-22369
Conversent Communications of Maine, LLC	19-22372
Conversent Communications of Massachusetts, Inc.	19-22375
Conversent Communications of New Hampshire, LLC	19-22378
Conversent Communications of New Jersey, LLC	19-22380
Conversent Communications of New York, LLC	19-22384
Conversent Communications of Pennsylvania, LLC	19-22386
Conversent Communications of Rhode Island, LLC	19-22388
Conversent Communications of Vermont, LLC	19-22391
Conversent Communications Resale, L.L.C.	19-22394
CoreComm Communications, LLC	19-22399
CoreComm-ATX, Inc.	19-22401
CTC Communications Corporation	19-22405
CTC Communications of Virginia, Inc.	19-22407
D&E Communications, LLC	19-22411
D&E Management Services, Inc.	19-22414
D&E Networks, Inc.	19-22417
D&E Wireless, Inc.	19-22419
DeltaCom, LLC	19-22423
EarthLink Business, LLC	19-22427
EarthLink Carrier, LLC	19-22430
Equity Leasing, Inc.	19-22432
Eureka Broadband Corporation	19-22435
Eureka Holdings, LLC	19-22437
Eureka Networks, LLC	19-22438
Eureka Telecom of VA, Inc.	19-22442
Eureka Telecom, Inc.	19-22445
Georgia Windstream, LLC	19-22447
Heart of the Lakes Cable Systems, Inc.	19-22451
Infocore, Inc.	19-22314
InfoHighway Communications Corporation	19-22318
Info-Highway International, Inc.	19-22321
InfoHighway of Virginia, Inc.	19-22325
Intellifiber Networks, LLC	19-22328
Iowa Telecom Data Services, L.C.	19-22330
Iowa Telecom Technologies, LLC	19-22333
IWA Services, LLC	19-22336
KDL Holdings, LLC	19-22337
LDMI Telecommunications, LLC	19-22342
Lightship Telecom, LLC	19-22346
MASSCOMM, LLC	19-22347
McLeodUSA Information Services LLC	19-22350

**Windstream Holdings, Inc., et. al.
Debtor List**

Debtor Name	Case No.
McLeodUSA Purchasing, L.L.C.	19-22352
McLeodUSA Telecommunications Services, L.L.C.	19-22355
MPX, Inc.	19-22357
Nashville Data Link, LLC	19-22361
Network Telephone, LLC	19-22364
Norlight Telecommunications of Virginia, LLC	19-22367
Oklahoma Windstream, LLC	19-22370
Open Support Systems, LLC	19-22373
PaeTec Communications of Virginia, LLC	19-22376
PaeTec Communications, LLC	19-22311
PAETEC Holding, LLC	19-22381
PAETEC iTel, L.L.C.	19-22385
PAETEC Realty LLC	19-22389
PAETEC, LLC	19-22393
PCS Licenses, Inc.	19-22396
Progress Place Realty Holding Company, LLC	19-22398
RevChain Solutions, LLC	19-22402
SM Holdings, LLC	19-22406
Southwest Enhanced Network Services, LLC	19-22409
Talk America of Virginia, LLC	19-22412
Talk America, LLC	19-22416
Teleview, LLC	19-22420
Texas Windstream, LLC	19-22316
The Other Phone Company, LLC	19-22323
Trinet, LLC	19-22327
TruCom Corporation	19-22334
US LEC Communications LLC	19-22340
US LEC of Alabama LLC	19-22343
US LEC of Florida LLC	19-22348
US LEC of Georgia LLC	19-22351
US LEC of Maryland LLC	19-22379
US LEC of North Carolina LLC	19-22383
US LEC of Pennsylvania LLC	19-22395
US LEC of South Carolina LLC	19-22404
US LEC of Tennessee LLC	19-22410
US LEC of Virginia LLC	19-22415
US Xchange of Illinois, L.L.C.	19-22425
US Xchange of Indiana, L.L.C.	19-22436
US Xchange of Michigan, L.L.C.	19-22443
US Xchange of Wisconsin, L.L.C.	19-22450
US Xchange, Inc.	19-22455
Valor Telecommunications of Texas, LLC	19-22460
WaveTel NC License Corporation	19-22465

**Windstream Holdings, Inc., et. al.
Debtor List**

Debtor Name	Case No.
WIN Sales & Leasing, Inc.	19-22470
Windstream Accucomm Networks, LLC	19-22472
Windstream Accucomm Telecommunications, LLC	19-22475
Windstream Alabama, LLC	19-22478
Windstream Arkansas, LLC	19-22483
Windstream Buffalo Valley, Inc.	19-22487
Windstream Business Holdings, LLC	19-22310
Windstream BV Holdings, LLC	19-22494
Windstream Cavalier, LLC	19-22500
Windstream Communications Kerrville, LLC	19-22424
Windstream Communications Telecom, LLC	19-22429
Windstream Communications, LLC	19-22433
Windstream Concord Telephone, LLC	19-22439
Windstream Conestoga, Inc.	19-22446
Windstream CTC Internet Services, Inc.	19-22448
Windstream D&E Systems, LLC	19-22452
Windstream D&E, Inc.	19-22457
Windstream Direct, LLC	19-22459
Windstream Eagle Holdings, LLC	19-22464
Windstream Eagle Services, LLC	19-22467
Windstream EN-TEL, LLC	19-22390
Windstream Finance Corp.	19-22397
Windstream Florida, LLC	19-22413
Windstream Georgia Communications, LLC	19-22418
Windstream Georgia Telephone, LLC	19-22422
Windstream Georgia, LLC	19-22426
Windstream Holding of the Midwest, Inc.	19-22431
Windstream Iowa Communications, LLC	19-22434
Windstream Iowa-Comm, LLC	19-22441
Windstream IT-Comm, LLC	19-22444
Windstream KDL, LLC	19-22449
Windstream KDL-VA, LLC	19-22453
Windstream Kentucky East, LLC	19-22458
Windstream Kentucky West, LLC	19-22462
Windstream Kerrville Long Distance, LLC	19-22468
Windstream Lakedale Link, Inc.	19-22473
Windstream Lakedale, Inc.	19-22477
Windstream Leasing, LLC	19-22482
Windstream Lexcom Communications, LLC	19-22486
Windstream Lexcom Entertainment, LLC	19-22491
Windstream Lexcom Long Distance, LLC	19-22498
Windstream Lexcom Wireless, LLC	19-22502
Windstream Mississippi, LLC	19-22504

**Windstream Holdings, Inc., et. al.
Debtor List**

Debtor Name	Case No.
Windstream Missouri, LLC	19-22506
Windstream Montezuma, LLC	19-22508
Windstream Nebraska, Inc.	19-22510
Windstream Network Services of the Midwest, Inc.	19-22511
Windstream New York, Inc.	19-22512
Windstream Norlight, LLC	19-22513
Windstream North Carolina, LLC	19-22514
Windstream NorthStar, LLC	19-22515
Windstream NTI, LLC	19-22516
Windstream NuVox Arkansas, LLC	19-22517
Windstream NuVox Illinois, LLC	19-22518
Windstream NuVox Indiana, LLC	19-22519
Windstream NuVox Kansas, LLC	19-22476
Windstream NuVox Missouri, LLC	19-22480
Windstream NuVox Ohio, LLC	19-22484
Windstream NuVox Oklahoma, LLC	19-22489
Windstream NuVox, LLC	19-22492
Windstream of the Midwest, Inc.	19-22496
Windstream Ohio, LLC	19-22501
Windstream Oklahoma, LLC	19-22503
Windstream Pennsylvania, LLC	19-22505
Windstream Services, LLC	19-22400
Windstream SHAL Networks, Inc.	19-22507
Windstream SHAL, LLC	19-22509
Windstream Shared Services, LLC	19-22479
Windstream South Carolina, LLC	19-22481
Windstream Southwest Long Distance, LLC	19-22485
Windstream Standard, LLC	19-22488
Windstream Sugar Land, LLC	19-22490
Windstream Supply, LLC	19-22493
Windstream Systems of the Midwest, Inc.	19-22495
Windstream Western Reserve, LLC	19-22497
XETA Technologies, Inc.	19-22499