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

_____)	
In re:)	
)	Chapter 11
WINDSTREAM HOLDINGS, INC. et al.,)	
)	Case No. 19-22312 (RDD)
Debtors.)	(Jointly Administered)
_____)	

**JICARILLA APACHE NATION'S
REPLY IN SUPPORT OF
AMENDED MOTION FOR RELIEF FROM AUTOMATIC STAY**

COMES NOW the Jicarilla Apache Nation (the Nation), by and through its attorneys, Stelzner, Winter, Warburton, Flores, Sanchez & Dawes, P.A., and for its Reply in Support of its Amended Motion for Relief from Automatic Stay states:

I. INTRODUCTION

The Nation is a federally-recognized Indian Tribe organized under the Indian Reorganization Act of June 18, 1934. On August 3, 2018, the Nation filed an action in Jicarilla Apache Nation Court, in which it primarily seeks to acquire through exercise of its power of eminent domain the telecommunications system assets located on Nation Lands serving members



of the Jicarilla Apache Nation and members of the public residing on Nation lands in and around Dulce, New Mexico.

Debtors Valor Telecommunications of Texas, LLC (Valor), and Windstream Holdings, Inc. (Windstream Holdings), are named as defendants in the Tribal court eminent-domain proceeding. Although the assets the Nation seeks to acquire are owned by a separate (and unrelated) entity, Uniti Group, Inc. (Uniti), the Nation understands that Windstream Holdings may have a leasehold interest in those assets. The Nation further believes that Valor is a subsidiary of Windstream Holdings and currently provides telecommunications service in Dulce, New Mexico and the surrounding area.

The Nation has sought relief from the automatic stay under 11 U.S.C. § 362(d)(1). As detailed in the Nation's Motion, the eminent-domain proceeding is in furtherance of the public welfare of the Nation, is primarily directed at a third party, will not interfere with this matter, and will not prejudice the interests of Debtors' creditors. The interests of the Nation and the public (primarily Nation members) in pursuing that proceeding outweighs any interest Windstream would have in staying the proceeding, and staying that matter would not further the policies underlying the automatic stay.

On July 19, 2019, Uniti filed a Reservation of Rights and Response to the Nation's Amended Motion for Relief from the Automatic Stay, in which Uniti indicated that it does not object to lifting the automatic stay to allow the Nation to pursue the action pending in Tribal court, as long as Windstream Holdings agrees to comply with the provisions of its lease agreement. *See* Reservation of Rights and Response to Amended Motion of the Jicarilla Apache Nation for Relief From Automatic Stay (Doc. No. 823).

On July 23, 2019, Debtors filed an Objection to the Nation's Amended Motion. *See* Debtors' Objection to Motion to Lift Stay Pending Litigation Against Valor Telecommunications of Texas, LLC, CSL New Mexico System, LLC, Windstream Holdings, Inc., and Certain Debtor Defendants, Doc. No. 835 (hereinafter "Objection"). Debtors' Objection consists largely of boilerplate arguments regarding the purposes underlying the automatic stay, and potential impacts of granting relief from the stay. Debtors make little effort to address the unique nature of the Nation's pending action or the unique nature of the Nation.

Importantly, however, the Nation is not asserting a run-of-the-mill claim for damages, and is not an ordinary creditor seeking to prioritize its claim. Rather, having formally determined that controlling and managing the transmission and distribution of telecommunications serving the Nation, Nation members, Dulce, New Mexico and the surrounding area, the Nation seeks to acquire telecommunications assets for public use through the exercise of its power of eminent domain. Those assets are not owned by Debtors, and Debtors will be compensated for any interest they may have in them. Moreover, the pending Tribal court action is unlikely to be prolonged or to require extensive attention and resources of Debtors. In these circumstances, good cause exists for granting relief from the automatic stay, and the Court should grant the Nation's Motion.

II. STANDARD

Under 11 U.S.C. § 362(d) the Court may grant relief from the automatic stay for cause. The parties agree on what factors are relevant to the decision whether to grant relief from the stay. Those factors are:

(1) whether relief would result in a partial or complete resolution of the issues; (2) lack of any connection with or interference with the bankruptcy case; (3) whether the other proceeding involves the debtor as a fiduciary; (4) whether a specialized tribunal with the necessary expertise has been established to hear the cause of action; (5) whether the debtor's insurer has assumed full responsibility for [a defense]; (6) whether the action primarily involves third parties; (7) whether

litigation in another forum would prejudice the interests of other creditors; (8) whether the judgment claim arising from the other action is subject to equitable subordination; (9) whether the movant's success in the other proceeding would result in a judicial lien avoidable by the debtor; (10) the interests of judicial economy and the expeditious and economical resolution of litigation; (11) whether the parties are ready for trial in the other proceeding; and (12) [the] impact of the stay on the parties and the balance of harms.

Schneiderman v. Bogdanovich, 292 F.3d 104, 110 (2d. Cir. 2002) at 110 n.1.

Not every one of these factors will be relevant in every case. *Id.* at 110. And the Court need not weigh them each equally. *See In re Keene Corp.*, 171 B.R. 180, 183 (S.D.N.Y. 1994). “When applying these factors and considering whether to modify the automatic stay, the Court should take into account the particular circumstances of the case, and ascertain what is just to the claimants, the debtor and the estate.” *Id.* “[T]he decision of whether to lift the stay is committed to the discretion of the bankruptcy judge.” *In re Sonnox Indus.*, 907 F.2d 1280, 1286 (2d. Cir. 1990) (internal quotation marks and brackets omitted).

III. GOOD CAUSE WARRANTING RELIEF FROM THE STAY EXISTS.

A. The Nation’s Eminent Domain Action Will Not Interfere With this Bankruptcy Proceeding, Primarily Involves a Third Party, and Will Not Prejudice the Interests of Debtors’ Creditors.

As detailed in the Nation’s Motion, the relevant factors weigh in favor of relief from the stay. Most significantly, the eminent-domain proceeding is not connected to, and does not interfere with, the bankruptcy proceeding, the action primarily involves a third party, and the action will not prejudice the interest of Debtors’ creditors. *See Schneiderman*, 292 F.3d at 110 n.1.

The Nation’s action is unique in that it is primarily aimed at the acquisition of telecommunications assets for public use exclusively on Native-owned lands. Those assets are not owned by Debtors, but instead, by a third party (Uniti), which has expressed no objection to the Nation’s Motion (provided that Windstream Holdings, Inc. abides by its contractual obligations).

Debtors do not argue in their Objection that they own the property, but instead assert that any leasehold interest they have should be considered property of the estate. Objection at 11. Debtors thus take the position that the Nation's acquisition of the telecommunications assets could interfere with "the interests of creditors who derive value" from their leasehold interest. *Id.* at 12.

Debtors fail to meaningfully acknowledge that the Nation's acquisition of the property will require payment of just compensation. The Nation's eminent-domain action will accordingly not deplete the estate or have any significant impact on others having claims against the bankruptcy estate – indeed the eminent domain action could turn a leasehold interest into a more liquid asset. This is typical of eminent-domain proceedings, and makes it particularly appropriate to grant relief from the automatic stay. *See, e.g., In re Chicago, Milwaukee, St. Paul, & Pacific Rwy. Co.*, 739 F.2d 1169, 1174 (7th Cir. 1984) ("the guiding principle should be to permit the exercise of the power of eminent domain to the greatest extent consistent with the purposes of the reorganization proceeding"); *In re F.A. Potts & Co.*, 49 B.R. 517, 519 (E.D. Pa. 1985) ("Here, the purpose of the debtor's bankruptcy case is the orderly, fair, and reasonably prompt liquidation of its remaining property. We find that the proposed state condemnation action is consistent with this purpose.").

Debtors thus, not surprisingly, prefer to focus on the fact that the Nation also raises the issue of Debtors' continued occupation of Nation lands despite expiration of the franchise agreement, which at one time authorized that occupation. But that incidental claim does not justify denying the Nation appropriate relief from the stay to pursue its important eminent-domain claim. Should any damages be awarded in the Tribal court action, the Nation will proceed appropriately to collect the judgment. *See* Objection at 10-11. That possibility does not justify the extended

delay of the Nation's acquisition of the telecommunications assets that would be caused in the event the Nation's Motion is denied.¹

B. Debtors' Speculative Concerns Do Not Support Denial of the Nation's Motion.

Debtors also make generalized arguments about what could happen in the event the Court grants the Nation relief from the stay, without providing any specific facts or information upon which the Court could conclude that there is any appreciable risk of those events occurring here. For example, Debtors claim that granting relief from the stay would potentially “‘open[] the floodgates’ to other lift stay motions.” Objection at 13. Yet Debtors notably fail to identify any other litigation similar to the Nation's, i.e. a sovereign nation's eminent domain proceeding of a small telecommunications system, such that other parties could be persuaded to seek relief from the stay in the event the Nation is successful. *Compare, e.g., In re SunEdison, Inc.*, 557 B.R. 303, 308 (S.D.N.Y. 2016) (noting in the context of expressing concern about opening the floodgates that “the Debtors are defendants in several lawsuits asserting ‘massive’ claims that could have a ‘very major effect on stakeholder recoveries.’”).

The relief the Nation is seeking in the eminent-domain proceeding is quite unique. And there certainly has not been a flood of similar motions since the Nation filed its Motion. Rather, it appears that only two other motions for relief from the automatic stay have been filed to date—both of which are very different than the Nation's and were filed before the Nation's motion. *See* Doc. Nos. 214, 402. Windstream's speculation that granting the Nation relief to pursue its eminent domain-proceeding could subject it to other motions for relief from the stay provides no basis for denying the Nation's motion.

¹ If the Court is concerned about the Nation's incidental claims for damages, it could grant relief from the stay allowing the Nation to pursue only the eminent domain claim.

Debtors' suggestion that judicial economy would be furthered by denying the Nation's motion is similarly unfounded. Debtors argue that the Nation's eminent domain action was only filed six months before the bankruptcy petition and assert that the case is only in its "early stages." *See* Objection at 9-10. This is not a true statement. Debtors again would have the Court treat the Nation's eminent-domain like a typical civil action. The Nation's rules contemplate a much faster process. *See* J.A.N. Code § 2-19-21, attached hereto as Exhibit A (party may demand trial within thirty days of eminent domain petition if appraisal has been filed). Moreover, discovery in the case was nearly complete and a mediator had been appointed with a mediation set just days after commencement of this action. Because the primary issue is the value of the assets to be acquired, and the just compensation to be paid by the Nation, discovery was streamlined and focused.

Furthermore this is not the Nation's or the Nation's Court's first acquisition of public utility facilities via the Tribal eminent domain code. Using the same expedited process, the Nation acquired all of the electric facilities on Nation lands in 2014. Thus, the Nation's Court's expertise with respect to its eminent-domain code also makes continued proceedings in the Tribal court in furtherance of judicial economy. *See Schneiderman*, 292 F.3d at 110 n.1 (factors to be considered include "whether a specialized tribunal with the necessary expertise has been established to hear the cause of action").

The focused proceedings contemplated by the Nation's rules additionally undermine Debtors' generalized allegations that Nation's eminent domain proceeding will "consume the Debtors' outside legal counsel" and that "lifting the stay will hinder the Debtors' operations, distract management, and thereby limit their ability to maximize the value of their estates." Objection at 15. Debtors in any event offer no information concerning what managers might be involved, or what operations could be affected by a single proceeding concerning Windstream

Holdings' apparent leasehold interest in telecommunications assets serving the Nation. Debtors cannot seriously contend that their management and operations will be significantly impacted by participation in the proceeding that will likely be focused on issues of value and just compensation for the acquisition of a discrete set of telecommunications assets providing service to approximately 1,300 Tribal members.

Regardless, Debtors then-legal counsel had already engaged in an extensive discovery process, a vigorous motion practice and had agreed to participate in a very near term mediation. There can be no doubt that Debtors and their then-legal counsel openly indicated a near-term resolution. And, the owner of the assets (Uniti) likewise had agreed to participate in the mediation – indeed, Uniti's then-legal counsel was even more open about early resolution (and the transfer of the assets to the Nation), going so far as to suggest appropriate compensation. Just days later, this action was filed.

C. The Balance of the Harms Weighs in Favor of the Nation.

Debtors do what they can to claim they would suffer hardship if the Nation's Motion is granted. But the Court cannot ignore that the Nation primarily seeks to acquire telecommunications assets not owned by Debtors, for which it will pay just compensation. That acquisition does not undermine the goals of this bankruptcy proceeding. *In re F.A. Potts & Co.*, 49 B.R. 517, 519 (E.D. Pa. 1985).

Indeed, the policies underlying the automatic stay have no application here, where the Nation is much different than an ordinary creditor. *Fidelity Mortgage Investors v. Camelia Builders, Inc.*, 550 F.2d 47, 55 (2nd Cir. 1976) (The automatic stay is designed "to prevent a chaotic and uncontrolled scramble for the debtor's assets in a variety of uncoordinated proceedings in different courts. The stay insures that the debtor's affairs will be centralized, initially, in a single

forum in order to prevent conflicting judgments from different courts and in order to harmonize all of the creditors' interests with one another.”).

The hardship the Nation will suffer – in pursuit of telecommunications service to Nation members – due to the delay and complication of its simple eminent-domain proceeding far outweighs any harm Debtors will suffer as a result of participating in what remains of a simple eminent-domain proceeding involving assets owned by a third party.

IV. GRANTING RELIEF FROM THE AUTOMATIC STAY WOULD BE CONSISTENT WITH 11 U.S.C. § 362(b)(4).

Finally, Debtors curiously devote much effort in their Objection to discussing the Nation’s reference to 11 U.S.C. § 362(b)(4), which provides that the filing of a bankruptcy petition does not operate to stay “the commencement or continuation of an action or proceeding by a governmental unit or any organization . . . to enforce such governmental unit's or organization’s police and regulatory power.”

Debtors argue that the Nation is not a “governmental unit” within the meaning of § 362(b)(4). Yet, the definition of “government unit” expressly provides only a non-exhaustive list of entities. *See* 11 U.S.C. § 101(27) (“governmental unit” means one of various enumerated entities “or other foreign or domestic government.”). And Debtors acknowledge that there is a split of authority on the topic of whether Indian Tribes are “government units.” *See* Objection at 4; *see also In re Money Ctr. Of Am.*, 565 B.R. 87, 101-102 (D. Del. Bankr. 2017) (“There is a split of authority regarding whether ‘governmental unit’ includes Indian tribes.”). Moreover, that authority is focused on the distinct issue of whether the Bankruptcy Code abrogates sovereign immunity. *See id.* Debtors have cited no authority holding that the exercise of police and regulatory authority by Indian Tribes would not fall within the scope of § 362(b)(4).

Because the definition of “government unit” is broad, the Court should conclude that the police and regulatory powers exception may apply to the Nation’s exercise of its power of eminent domain. That exception has, in fact, been found to include eminent domain proceedings. *See, e.g., In re Bevelle*, 348 B.R. 812, 820 (N.D. Ala. 2006) (“[T]he Court finds that the County’s condemnation of the Debtor’s property would be in the furtherance of public health, safety, or welfare of its citizens. Therefore, that action is within the police or regulatory powers of the County. Consequently, the automatic stay that arose when the instant case was filed did not prevent the County from filing a complaint for condemnation and does not stay that action now.”).

Although the primary basis of the Nation’s Motion is the good-cause provision of § 362(d)(1), § 362(b)(4) should, at a minimum, inform the Court’s analysis. The Nation has determined that acquisition of the telecommunications assets serving its residents is in the best interests of the Nation. Debtors’ allegation that the acquisition relates to a “pecuniary interest in the property,” *see* Objection at 6, is entirely unsupported, and untrue. Reliable telecommunications service is directly related to the public health, safety, and welfare, *see* 47 U.S.C. § 254, and the Nation is acting in furtherance of those interests in seeking to control telecommunications service for its residents and members.

V. CONCLUSION

The Nation’s pending eminent-domain primarily pertains to assets owned by a third party. Staying that action does not further the purposes of the automatic stay, and prejudices the interest of the Nation and its residents. The Court should accordingly find cause to grant the Nation relief from the automatic stay, or in the alternative, find that the eminent domain proceeding is within the police and regulatory exception under § 362(b)(4), and permit the Nation to continue what remains of its prosecution of the pending action in Jicarilla Apache Nation Court.

Dated: July 25, 2019.

Albuquerque, New Mexico

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TITLE 2: WRITTEN RULES OF COURT

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§ 2-19-21

Written Rules of Court

§ 21 TRIAL.

(A) Within thirty (30) days after the filing of the petition if an appraisal has been prepared pursuant to Section 7 or after the final confirmation of the report of the commissioners, a party may demand trial of any issues remaining in the cause. The cause shall be tried de novo, and unless waived, the parties shall be entitled to a trial by jury.

(B) If no issues other than compensation are raised, the court shall render a final judgment awarding the property to the condemnor contingent upon payment of the awarded compensation to the condemnee. In all other cases, the court shall render final judgment upon decision of all contested questions of law and fact.

§ 22 ORDER OF IMMEDIATE POSSESSION PRIOR TO JUDGMENT.

(A) At the time of filing the petition, the condemnor may apply to the court for an order for immediate possession of the property proposed to be taken.

(B) Upon filing the petition, the court shall set a time for hearing within thirty (30) days of the filing, and notice shall be given as provided in Section 18.

(C) At the time of the hearing, the court shall make an order authorizing the condemnor to take immediate possession of the property if it finds that the use for which the property sought to be condemned is a public use and that immediate possession is necessary.

(D) If the order is granted pursuant to Subsection (C) of this Section and no offer was made pursuant to Section 7, the court shall require the condemnor to deposit with the court an amount established by it. Money from the deposit may be invested and disbursed as provided in Subsections (E) through (G) of Section 19. Upon final confirmation of the report of the commissioners, the deposit made pursuant to this Subsection shall be adjusted to reflect that report. The adjustment, however, shall not require the condemnee to refund any amount withdrawn pursuant to Subsection (E) of Section 19, but any amount withdrawn shall be credited against the total amount awarded pursuant to Section 24.

(E) The order for immediate possession shall describe the property to which the condemnor is authorized to take possession. The description may be by reference to the petition. The order shall also state the date at which the condemnor is authorized to take possession of the property.

§ 23 POSSESSION; NO EFFECT ON OTHER RIGHTS.

By taking possession pursuant to the provisions of Section 22, the condemnor does not waive the right of appeal of the judgment, the right to abandon or the right to request a new trial.