COMMONWEALTH OF KENTUCKY

BEFORE THE PUBLIC SERVICE COMMISSION

In the Matter of:

ELECTRONIC APPLICATION OF WINDSTREAM HOLDINGS, INC., WINDSTREAM SERVICES, LLC, AMERICAN TELEPHONE COMPANY, LLC, BROADVIEW NETWORKS, INC., BUSINESS TELECOM, LLC, CTC COMMUNICATIONS CORPORATION, DELTACOM, LLC, EARTHLINK BUSINESS, LLC, EARTHLINK CARRIER, LLC, MCLEODUSA TELECOMMUNICATIONS SERVICES, LLC, NETWORK TELEPHONE, LLC, PAETEC COMMUNICATIONS, LLC, TALK AMERICA, LLC, THE OTHER PHONE COMPANY, LLC, US LEC OF TENNESSEE, LLC, WINDSTREAM COMMUNICATIONS, LLC, WINDSTREAM KDL, LLC, WINDSTREAM KENTUCKY EAST, LLC, WINDSTREAM KENTUCKY WEST, LLC, WINDSTREAM NORLIGHT, LLC, WINDSTREAM NTI, LLC, WINDSTREAM NUVOX, LLC FOR APPROVAL FOR AN ORDER APPROVING THE ACQUISITION OF COMMON STOCK BY ELLIOTT MANAGEMENT CORPORATION, PACIFIC INVESTMENT MANAGEMENT COMPANY LLC, OAKTREE CAPITAL GROUP, HBK CAPITAL MANAGEMENT, AND FRANKLIN RESOURCES INC.	)	CASE NO. 2020-00179

<u>O R D E R</u>

Windstream Holdings, Inc., and Windstream Services, LLC, (collectively, Windstream) along with American Telephone Company, LLC; Broadview Networks, Inc.; Business Telecom, LLC; CTC Communications Corporation; DeltaCom, LLC; EarthLink Business, LLC; EarthLink Carrier, LLC; McLeodUSA Telecommunications Services, LLC;

Network Telephone, LLC; PAETEC Communications, LLC; Talk America, LLC; The Other Phone Company, LLC; US LEC of Tennessee, LLC; Windstream Communications, LLC; Windstream KDL, LLC; Windstream Kentucky East, LLC; Windstream Kentucky West[1], LLC; Windstream Norlight, LLC; Windstream NTI, LLC, Windstream NuVox (collectively, the Windstream Licensees, and jointly with Windstream, Joint Applicants) request that the Commission, pursuant to KRS 278.020(6) and KRS 278.020(7), grant authority to complete a two-step transaction to enable Joint Applicants to emerge from Chapter 11 Bankruptcy. Joint Applicants assert that approval of their request will permit Joint Applicants to emerge from bankruptcy and continue to provide telecommunications services to Kentucky customers without interruption, without a transfer of customers, and without any resulting changes in rates, terms, or conditions of service. Joint Applicants propose to complete the Transaction on or before August 28, 2020.

On February 25, 2019, each of the Joint Applicants filed a voluntary Chapter 11 bankruptcy in the United States Bankruptcy Court for the Southern District of New York (the Bankruptcy Court). Windstream filed for voluntary bankruptcy after a holder of approximately $300 million of unsecured notes filed suit in federal court alleging a default on Windstream Services, LLC, bonds.[2]

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[1] Windstream Kentucky East and Windstream Kentucky West are two incumbent local exchange carriers; the remaining entities are either competitive local exchange carriers or long-distance providers.

[2] The litigation arose, in part, from the transfer of certain Windstream assets to a real estate investment trust that was approved by the Commission. Case No. 2014-00283, *Application of Windstream Kentucky East, LLC and Windstream Kentucky West, LLC (1) for a Declaratory Ruling That Approval Is Not Required for the Transfer of a Portion of Their Assets; (2) Alternatively for Approval of the Transfer of Assets; (3) for a Declaratory Ruling That Communications Sales and Leasing, Inc. Is Not Subject to KRS 278.020(1); and (4) for All Other Required Approvals and Relief* (Ky. PSC Dec 4, 2014).

Following the filing of the bankruptcy petitions and the securing of $1 billion in debtor-in-possession financing, the Joint Applicants continued to provide telecommunications service to its customers as it negotiated a comprehensive restructuring plan with its creditors. On April 1, 2020, Windstream filed a plan of reorganization proposing a restructuring that would allow the Joint Applicants to emerge from Chapter 11. The plan of reorganization was amended on May 6, 2020. No competing reorganization plans have been filed or are expected to be filed, and the Bankruptcy Court issued an order of findings and facts on June 26, 2020 approving the plan of reorganization.

As contemplated by the plan of reorganization, the interests held by the existing stockholders of Windstream will be canceled and 100.0 percent of the new equity in New Windstream will be issued to the company's first lien debtholders on the terms set forth in the plan of reorganization. The Joint Applicants assert that following consummation of the Transaction, Windstream will move forward with a stable capital structure, uninterrupted service, and an increased capability to compete to bring advanced telecommunications services to current and new customers.[3] The Joint Applicants further assert that the reorganization plan does not affect any existing agreements with other telecommunications carriers, or any price regulated plans.[4]

A substantial majority of New Windstream's equity will be held by subsidiaries, affiliates or affiliated entities of six investment companies (collectively with their subsidiaries and affiliates, the First Lien Investors): (1) Elliott Management Corporation;

[3] Application at 3 – 4

[4] *Id.* at 4

(2) Pacific Investment Management Company LLC; (3) Oaktree Capital Group; (4) HBK Capital Management; (5) Franklin Resources Inc. operating as Franklin Templeton; and (6) Brigade Capital Management, L.P. Elliott and its affiliates are anticipated to ultimately hold an estimated aggregate of 40.3 percent of the voting equity in New Windstream indirectly through an aggregator entity, Nexus Aggregator L.P., a Delaware limited partnership. The remaining First Lien Investors, consisting of funds controlled by five other investment companies, are anticipated to hold approximately 40.9 percent of the equity in Windstream post-consummation.

The Transactions are subject to review and approval by the Federal Communications Commission (FCC) and are expected to occur in two steps[5]. The Joint Applicants are using this two-step process because some of the First Lien Investors' subsidiaries, affiliates or affiliated entities that will be acquiring equity interests in New Windstream are registered in other countries or have foreign investors. Federal law requires additional review of foreign ownership above defined thresholds in entities that hold certain FCC issued licenses and federal authorizations held by Windstream affiliates.[6] According to the Joint Applicants, it is expected that the FCC will approve the foreign investors' acquisition of equity interests in wireless licensees and that where this type of federal review is required for companies emerging from bankruptcy, the FCC has permitted and encouraged them to structure their transition to new ownership in two steps.

[5] The Joint Applicants' FCC petition is docketed as *In the Matter of Windstream Holdings, Inc., Debtor-in-Possession, Transferor, and Windstream Holdings, Inc., Transferee, Application for Consent to Transfer Control of Domestic and International Section 214 Authorizations,* WC Docket No. 20-151. The FCC petition is still pending as of the date of entry of this Order.

[6] *See e.g.,* 47 U.S.C. § 310(b)(4).

Under this two-step process, Windstream will emerge from bankruptcy with the First Lien Investors holding a mix of equity interests that do not require FCC review or approval of foreign ownership and warrants in New Windstream. Then, New Windstream will request FCC approval for the warrant holders to exercise the warrants. Once that approval is granted, the warrants will be exercised, with the First Lien Investors controlling essentially all of the equity of post-bankruptcy New Windstream.

The Joint Applicants request approval, of both (1) the initial reorganization of Windstream and issuance of equity and warrants by which the First Lien Investors will come to own equity in New Windstream, as described above; and (2) the ultimate exercise of those warrants. The Joint Applicants assert that this process will permit Windstream to emerge from bankruptcy more quickly, while at the same time accommodating all appropriate regulatory reviews and as a result of the reorganization, the company's debt will be reduced by approximately 50.0 percent.

The First Lien Investors will acquire an indirect ownership interest through the Transaction, at the parent company level and they will not operate or provide telecommunications services in Kentucky. The Windstream Licensees will continue to provide telecommunications services in Kentucky. Joint Applicants represent that the current management and corporate leadership will remain in place following emergence from bankruptcy and post-transaction. Accordingly, the Joint Applicants submit that the proper inquiry under KRS 278.020(6) and KRS 278.020(7), is whether Windstream and the Windstream Licensees will continue to have the financial, technical, and managerial ability to provide reasonable service in the Commonwealth.

DISCUSSION

Of the Windstream Licensees, Commission approval for the transfer is only required for the incumbent local exchange carriers (ILECs), Windstream East and Windstream West.[7] The Commission's jurisdiction over Windstream East's and Windstream West's provision of service is more constrained than that of other utility types.[8] Thus, the Commission's review of any transfer of ownership of the two ILECs would necessarily focus upon the areas over which the Commission has jurisdiction for example, but not limited to: pole attachments; provision of basic local exchange service; interconnection with competitors and the effect on competition (under the aegis of federal law); and accuracy for billing.

With regard to the areas over which the Commission had jurisdiction, the proposed transfer does not appear to affect the Joint Applicants' ability to provide those services or comport with the various requirements therein. The ILECs (and the REIT from whom the ILECs lease poles) will still be under the requirements imposed by the Commission in Case No. 2014-00283. Likewise, regardless of the ownership of ILECs, they are still subject to federal law regarding wholesale service and interconnection pursuant to the Federal Telecommunication Act of 1996.[9] The Commission does not have jurisdiction over issues of pricing for residential customers.

[7] *See*, Administrative Case No. 370, *Exemptions for Providers of Local Exchange Service Other Than Incumbent Local Exchange Carriers* (KY. PSC Jan. 8, 1998).

[8] KRS 278. 541-544; KRS 278.54611; and KRS 278.5435.

[9] Pub. L. No. 104-104, 110 Stat. 56 (1996)

The Transaction is more complicated than a *pro forma* reorganization, the like of which the Commission has approved before.[10] This high-level transfer of control is necessitated by a voluntary bankruptcy, and the necessity to satisfy creditors while emerging from bankruptcy. Presumably, but for the bankruptcy, this transfer would not have occurred. While the Transaction does involve a transfer of control, it is occurring at a very high level and does not appear that it will affect the day-to-day operation of the ILECs. The Transaction also is not like a transfer of control where there is a merger or transfer with a former competitor that raises anti-competitive concerns such as the merger of AT&T, Inc. and BellSouth Corporation in 2006, in which case the Commission would have concerns about the effect of the transfer of control and would scrutinize the transaction more closely.[11] None of the new equity holders of Windstream are registered as utilities in Kentucky or otherwise directly own or operate facilities associated with provision of telecommunications service in Kentucky.

KRS 278.020(6) provides that the Commission shall grant approval if "the person acquiring the utility has the financial, technical, and managerial abilities to provide reasonable service." To the extent Commission approval is required, the Commission finds that the Transaction satisfies these standards. Following the closing of the Transaction, the Windstream Licensees, as part of Windstream, will possess the financial ability to provide the certificated services to the public. Likewise, the Joint Applicants anticipate significant continuity in Windstream's management team following the

[10] Case No. 2013-00176, *Application Of Windstream Kentucky East, LLC, Windstream Kentucky West, LLC, and Windstream Corporation for Authority to Complete a Certain Pro Forma Intra-Corporate Transaction* (Ky. PSC June 28, 2013).

[11] Case No. 2006-00136 *Joint Application for Approval of the Indirect Transfer of Control Relating to the Merger of AT&T Inc. and Bellsouth Corporation* (Ky. PSC July 25, 2006).

reorganization, and the Windstream Licensees will thus continue to be managed and operated by experienced executives and employees under the Windstream corporate structure. Based upon these representations, the Commission finds that the Windstream Licensees will maintain the same technical and managerial ability to continue to provide telecommunications services.

KRS 278.020(7) provides in pertinent part that the Commission shall approve a proposed transaction subject to its provisions upon finding that the proposed transaction "is to be made in accordance with law, for a proper purpose and is consistent with the public interest." Because of the Commission's limited jurisdiction in this realm, the high-level nature of the transfer of equity from numerous shareholders to a handful of investors, and the lack of anti-competitive concerns, the Commission finds that the Transaction comports with each of these requirements and that the Transaction should be approved.

IT IS THEREFORE ORDERED that:

1. The Transaction as proposed in the Joint Applicants' application is approved.

2. This case is closed and removed from the Commission's docket.

By the Commission

ENTERED

AUG 25 2020 rcs

KENTUCKY PUBLIC
SERVICE COMMISSION

ATTEST:

Acting Executive Director

*Carol Keith
Director, Regulatory/Public Affairs
Windstream NuVox, LLC
130 W New Circle Road, Suite 170
Lexington, KY 40505

*Honorable Christopher W Savage
Cole Raywid & Braverman, L.L.P.
1919 Pennsylvania Avenue, N.W.
Suite 200
Washington, DISTRICT OF COLUMBIA 20006

*Heather Moelter
Davis Wright Tremaine LLP
1919 Pennsylvania Ave. NW
Suite 800
Washington, DISTRICT OF COLUMBIA 20006-

*Katie M Glass
Stites & Harbison
421 West Main Street
P. O. Box 634
Frankfort, KENTUCKY 40602-0634

*Michael C. Sloan
Davis Wright Tremaine LLP
1919 Pennsylvania Ave. NW
Suite 800
Washington, DISTRICT OF COLUMBIA 20006-

*Honorable Mark R Overstreet
Attorney at Law
Stites & Harbison
421 West Main Street
P. O. Box 634
Frankfort, KENTUCKY 40602-0634

*Nicole Winters
Windstream Communications, LLC
130 W New Circle Road, Suite 170
Lexington, KY 40505