

June 11, 2020

VIA ELECTRONIC FILING

Marlene H. Dortch, Secretary
Federal Communications Commission
445 12th Street, S.W.
Room TW-A325
Washington, DC 20554

Re: *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; IB File Nos. ITC-T/C-20200522-00081, ITC-T/C-20200522-00082, ITC-T/C-20200522-00083; ULS File Nos. 0009081087, 0009082139, 0009082351, 0009082392, 0009082434, 0009082528, 0009085568, 0009085592, 0009085614*

Dear Ms. Dortch:

This letter is submitted on behalf of the parties to the above-referenced transfer of control applications (“Windstream Transfer of Control Applications”) to clarify their pending request for waiver of the Commission’s processing rules submitted in connection with these applications. At the request of Commission staff, the attached Petition for Temporary and Limited Waiver is being filed contemporaneously via IBFS with respect to the pending international Section 214 transfer of control applications identified above. The parties request that the language of this Petition also be substituted for the waiver request contained in the exhibit to its original application filed May 21, 2020. *See* Windstream Transfer of Control Applications, “Description of Proposed Transaction and Public Interest Statement,” at 18-23.

The revised waiver provides two principal clarifications. First, it makes plain that there are two separate types of special warrants that will be issued at Step One of the transaction. At page one of the attached Petition, the parties explain that “To achieve the necessary level of indirect foreign equity and voting interests at Step One, some investors will own warrants in New Windstream, and some investors, including foreign affiliates of Elliott and Brigade Capital Management, LP, will own warrants in their own U.S. affiliates.” *See also* Section II at 5. Thus there will be two separate types of special warrants, those issued by New Windstream, and those issued by certain investors in New Windstream. Both of these types of warrants will be subject to the Petition for Declaratory Ruling filed at Step Two to permit their exercise pursuant to requests for specific approval.

Second, at pages three to four, the revised waiver request clarifies that it seeks deferral of Commission consideration of the pre-paid warrants at Step One because if the Commission were to treat such warrants as equity in its initial review of the proposed New Windstream ownership, “that decision could place New Windstream in the position of having foreign ownership in

excess of the relevant foreign ownership limits specified in 47 U.S.C. § 310(b)(4) and trigger a significantly lengthier and immediate review of these ownership interests.” By deferring consideration of the special warrants to Step Two, in the context of a Petition for Declaratory Ruling to permit their exercise, the Commission will allow New Windstream to emerge quickly from bankruptcy, which can be expected to benefit both the company and its customers.

Please contact the undersigned if you have any questions regarding this matter.

Respectfully submitted,

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**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C.**

In the Matter of)	
)	
Windstream Holdings, Inc.,)	WC Docket No. 20-151
Debtor-in-Possession)	
Transferor)	ISP-WAV-202006__-_____
)	
and)	
)	
Windstream Holdings, Inc.)	
Transferee)	
)	
Applications for Consent to Transfer of Control)	
of Licenses and Authorizations)	
)	

PETITION FOR TEMPORARY AND LIMITED WAIVER

The Applicants in the above-captioned transfer of control applications request—to the extent required—a waiver of certain Commission rules and processing policies to seek approval of the transfer of control of Windstream as a two-step process.¹ In Step One, certain parties eligible to obtain equity under the Plan of Reorganization would be issued special warrants sufficient to ensure that, following the completion of Step One, (1) no non-U.S. person or entity directly or indirectly holds a ten percent or greater voting or equity interest in New Windstream and (2) the aggregate foreign equity and voting interests in New Windstream would remain below the 25% threshold under Section 310(b) of the Act. To achieve the necessary level of indirect foreign equity and voting interests at Step One, some investors will own warrants in

¹ The definitions of all defined terms appear in the Public Interest Statement accompanying the related transfer of control applications. *See, e.g.*, Windstream Transfer of Control Applications, “Description of Proposed Transaction and Public Interest Statement,” IB File Nos. ITC-T/C-20200522-00081, ITC-T/C-20200522-00082, ITC-T/C-20200522-00083.

New Windstream, and some investors, including foreign affiliates of Elliott and Brigade Capital Management, LP, will own warrants in their own U.S. affiliates.

In Step Two of the transaction, the Applicants would file, no later than thirty days following emergence from bankruptcy, a Petition for Declaratory Ruling effectively seeking Commission approval to permit exercise of the special warrants issued at Step One. The Step Two Petition would include requests for specific approval of each foreign-owned investor that would have sufficient post-exercise voting or equity ownership stakes in New Windstream to require approval. The Petition would also seek advance approval for New Windstream to be up to 100% foreign owned in the aggregate, consistent with the Commission's rules governing such requests.

As explained above, this two-step process would allow New Windstream, Windstream, and their subsidiaries to emerge expeditiously from bankruptcy and avoid the adverse consequences that could result from a delay in implementing the Plan of Reorganization. Operating as a debtor-in-possession imposes significant financial and operational burdens on Windstream, such as a potential need to incur additional indebtedness to maintain liquidity. A prompt emergence from bankruptcy will allow the company to resume normal operations and will have significant public interest benefits, including providing even greater assurance of continuity of service to customers.

I. Background

The Commission has historically refrained from considering pre-paid warrants as present interests for calculating ownership in Commission-regulated entities, a position consistently adhered to in cases covering myriad types of Commission licenses subject to the limitations on foreign ownership under Section 310(b) of the Communications Act. Accordingly, it is well-

established that “an option held by an alien to buy stock in a licensee or the parent of a licensee is not cognizable until exercised.”² Indeed, the notes to the current rules governing petitions for declaratory ruling under Section 310(b) provide that in “calculating foreign equity and voting interests, the Commission does not consider convertible interests such as options, warrants and convertible debentures until converted, *unless specifically requested by the petitioner, i.e.*, where the petitioner is requesting approval so those rights can be exercised in a particular case *without further Commission approval.*”³

However, at the suggestion of Commission staff, Applicants seek this temporary and limited waiver should it be necessary with respect to the Commission’s treatment of the special warrants. If the Commission were to treat the pre-paid warrants as equity in the context of reviewing the proposed New Windstream ownership, that decision could place New Windstream in the position of having foreign ownership in excess of the relevant foreign ownership limits specified in 47 U.S.C. § 310(b)(4) and trigger a significantly lengthier and immediate review of these ownership interests. A Commission undertaking of this longer review prior to the emergence of Windstream from bankruptcy protection would impose substantial burdens on the company and its customers, as well as the Applicants. By deferring this more extensive review

² See *WWOR-TV, Inc.*, Memorandum Opinion and Order, 6 FCC Rcd 6569 (1991). See also *Stratos Global Corp. and Robert M. Franklin*, Memorandum Opinion and Order and Declaratory Ruling, 22 FCC Rcd 21328, 21361, ¶ 78 (2007) (“The Commission has long held that future interests such as warrants, options and convertible debt do not constitute capital stock until exercised or converted and, thus, are not relevant to the foreign ownership analysis”); *Tribune Company and its Licensee Subsidiaries, Debtors in Possession, et al.*, Memorandum Opinion and Order, 27 FCC Rcd 14239, 14245 n.32 (MB 2012); *NextWave Personal Communications, Inc.*, Memorandum Opinion and Order, 12 FCC Rcd 2030, 2051, ¶ 46 (WTB 1997); *BBC License Subsidiary, L.P.*, Memorandum Opinion and Order, 10 FCC Rcd 10968, 10973 n.12, citing *Univision Holdings, Inc.*, Memorandum Opinion and Order, 7 FCC Rcd 6672, 6674, ¶ 8 (1992), *recon. denied*, 8 FCC Rcd 3931 (1993).

³ 47 C.F.R. § 1.5001(i), Note to paragraph (i)(3)(ii)(A) (emphases added).

to Step Two of the proposed two-step process, in the context of a Petition for Declaratory Ruling to permit exercise of the special warrants, the public will benefit from Windstream's early emergence from bankruptcy, while the Commission will maintain the ability to review thoroughly the proposed ownership during Step Two. In recent cases, three different Bureaus have granted two specific requests for waiver of Commission Rules governing transfers of control of domestic and international Section 214 authorizations, as well as broadcast and common carrier Title III licenses subject to Section 310(b) of the Communications Act, for the specific purpose of permitting a two-step approval process like that contemplated here.⁴ These waivers allowed companies to emerge from bankruptcy without considering interests convertible to equity in step one, but conditioned grant of the waivers upon deferring review of these interests to an immediate second-stage of review.

Delayed consideration of certain potential foreign ownership stakes is warranted to permit a regulatee subject to Section 214 transfer of control review and/or Section 310(b) ownership limits to emerge quickly from bankruptcy without the need for protracted regulatory review of non-U.S. ownership stakes. The equitable powers and role of the Bankruptcy Court in overseeing the Chapter 11 process provide a critical distinction from cases in which warrants are issued in a negotiated private license acquisition. Such was the case in each of the two waiver requests noted above that were granted in order to allow two-step review, permitting early emergence from bankruptcy.

⁴ See *Fusion Connect Notice*, 35 FCC Rcd at 413; *Lieberman Order*, 34 FCC Rcd at 8551, ¶16 (both permitting a two-step process using an initial distribution of special warrants in lieu of equity that advances the public interest by permitting licensees to emerge from bankruptcy and begin normal operations more quickly than would otherwise be possible).

II. Justification for Waiver

This Application implicates the same basic set of facts as the waiver decisions discussed above: like those applicants, Windstream seeks to emerge from bankruptcy pursuant to a plan expected to receive court approval in the near term.⁵ The special warrants to be issued upon emergence at Step One, both in New Windstream and in certain of its investors, will allow the holders to purchase equity directly in New Windstream arising out of those warrants, or to hold equity interests in certain New Windstream investors arising out of those warrants, only after all necessary Commission approvals have been granted in Step Two.

The foreign interests that will be considered at Step Two are the types of foreign interests in U.S. Title III licensees and Section 214 authorization holders that the Commission routinely approves following appropriate regulatory review. They are German and Canadian investors in well-established U.S.-based investment management companies and investment vehicles established under the laws of nations like Bermuda and the Cayman Islands. These kinds of investments, from countries with long-standing productive relationships with the United States and important trade and security partners, are commonplace.

This is not a circumstance where a foreign carrier seeks a controlling interest in a U.S. carrier or where ownership interests would be held or controlled by countries with an adversarial trade or security relationship with the United States. Thus, while the foreign ownership interests

⁵ See, e.g., *Liberian Order*, 34 FCC Rcd at 8550, ¶14 (“It is the Commission’s longstanding practice to accommodate federal bankruptcy law when doing so will not unduly interfere with its public interest obligations under the Act”).

can be fully vetted prior to the closing of Step Two, there should be no concern about allowing Step One to proceed before that review is completed.⁶

Enabling a prompt emergence from bankruptcy will also lead to significant and immediate public interest benefits. As the Commission has found, facilitating successful and timely emergence from bankruptcy “advances the public interest by providing economic and social benefits, especially including the compensation of innocent creditors.”⁷ In addition, allowing Windstream to emerge from bankruptcy will enable New Windstream to focus entirely on improving service to its customers. The net result is clear: the expedited emergence of Windstream and its subsidiaries from bankruptcy with substantially less debt and improved operational arrangements will preserve current service to customers and foster greater near-term competition in local markets for telecommunications services across the country.⁸

⁶ See, e.g., *Liberian Order*, 34 FCC Rcd at 8550, ¶ 14 (“[G]rant of the waiver effectively provides interim Section 310(b)(4) authority only, in order to enable the prompt emergence of the LBI Debtors from bankruptcy, while preserving the Commission’s ability to review and rule on LBI’s foreign ownership following such emergence”), citing *Mobile Satellite Ventures Subsidiary LLC and SkyTerra Communications Inc.*, Order, 23 FCC Rcd 4436, 4444, ¶ 18 (2008) (granting the petitioners authority to hold on an interim basis up to a non-controlling 49.99% equity and voting interest in SkyTerra Communications subject to and without prejudice to any action the Commission may take on the associated request for permanent authority). See also *Fusion Connect Notice*, 35 FCC Rcd at 413.

⁷ *Fusion Connect Notice*, 35 FCC Rcd at 413 (quoting *WorldCom/MCI Order*, 18 FCC Rcd at 26503, ¶29 (2003)). See also *LaRose v. FCC*, 494 F.2d at 1146, n.2 (stating that in applying its policies where an application arises from bankruptcy, the Commission should consider “the public interest in the protection of innocent creditors”).

⁸ See, e.g., *Liberian Order*, 34 FCC Rcd at 8551, ¶ 15 (“[P]rompt grant of the Applications, subject to waiver, will expedite LBI Debtors’ emergence from bankruptcy and facilitate operational improvements made possible by new ownership.”).

III. Request for Relief

The Commission may waive any of its rules if “good cause” is demonstrated.⁹ In general, waiver is appropriate if (1) special circumstances warrant a deviation from the general rule; and (2) such deviation would better serve the public interest than would strict adherence to the rule.¹⁰ The Commission will grant a waiver of its rules in a particular case upon a showing that the relief requested will not undermine the policy objective of the rule in question and will otherwise serve the public interest.¹¹ In determining whether waiver is appropriate, it is well-established that the Commission should “take into account considerations of hardship, equity, or more effective implementation of overall policy.”¹²

Each of these factors applies in this case. As detailed in the foregoing section, favorable action will produce both public and private benefits by promoting competition and consumer welfare. In contrast, delaying Windstream’s emergence from bankruptcy would impose significant hardships on the Applicants and could have an adverse impact both on Windstream customers and on competition in markets in which Windstream operates.

Accordingly, to the extent required to expedite initial review and permit a two-step approval process, the Applicants seek a temporary and limited waiver of Sections 1.5000(a)(1), 1.948, 1.2112, 63.03, 63.04, 63.18, and 63.24 of the Commission’s Rules to the extent that any of these rules might require immediate scrutiny of pre-paid warrants contemporaneously with

⁹ See 47 C.F.R. § 1.3; *Northeast Cellular Tel. Co. v. FCC*, 897 F.2d 1164 (D.C. Cir. 1990); *WAIT Radio v. FCC*, 418 F.2d 1153 (D.C. Cir. 1969).

¹⁰ See *Northeast Cellular*, 897 F.2d at 1166.

¹¹ See *WAIT Radio*, 418 F.2d at 1157.

¹² *Id.* at 1159.

approval of present equity interests in Windstream that would exist at emergence. Applicants understand that such a waiver will be conditioned on filing of a Petition for Declaratory Ruling seeking approval to exercise the special warrants in Step Two of the proposed transaction within 30 days of Windstream's emergence from bankruptcy.¹³

¹³ See *Fusion Connect Notice*, 35 FCC Rcd at 413-14 (granting the applications and waiver requests “conditioned upon the filing, no later than 30 days after closing the transaction authorized by such grant, of a Petition for Declaratory Ruling to exceed the aggregate foreign ownership benchmark set forth in section 310(b)(4) of the Act...”). Unlike the circumstance in *Fusion Connect*, the circumstances here require only a Petition for Declaratory Ruling at Step Two as no entity will gain control at either step of the transaction; in *Fusion Connect*, the entity obtaining control at step one was divested of control at step two.

IV. Conclusion

For the foregoing reasons, the Applicants respectfully request that the Commission grant a temporary, limited waiver of its processing rules to allow the two-step processing approach described here and in the Windstream transfer of control applications.

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