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January 22, 1997

VIA FEDERAL EXPRESS

Ms. Blanca S. Bayo, Director
Division of Records & Reporting
Florida Public Service Commission
2540 Shumard Oak Blvd.
Tallahassee, FL 32399-0850

Re: Docket No. 960979-TP
Petition by WinStar Wireless of Florida, Inc. for Arbitration of Certain Terms and Conditions of a Proposed Agreement with GTE Florida Incorporated Concerning Resale and Interconnection Pursuant to 47 USC Section 252(b) of the Telecommunications Act of 1996

Dear Ms. Bayo:

Please find enclosed an original and fifteen copies of WinStar Wireless of Florida, Inc.'s Reply to Motion to Dismiss Issue No. 1 for filing in the above matter.

Please date-stamp the extra copy and return it to us in the enclosed envelope. Service has been made as indicated on the Certificate of Service. If there are any questions regarding this matter, please contact me at 202-424-7771.

Very truly yours,

Richard M. Rindler

Richard M. Rindler

Enclosures

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BEFORE THE
FLORIDA PUBLIC SERVICE COMMISSION

Petition by WinStar Wireless of Florida, Inc. for Arbitration of Certain Terms and Conditions of a Proposed Agreement with GTE Florida Incorporated Concerning Resale and Interconnection Pursuant to 47 USC Section 252(b) of the Telecommunications Act of 1996	**Docket No. 960979-TP** **Filed January 22, 1997**

WINSTAR WIRELESS OF FLORIDA, INC.'S REPLY TO GTE MOTION TO DISMISS ISSUE 1

On January 17, 1997, GTE of Florida Incorporated ("GTE") filed a motion to dismiss issue 1 in the above-referenced matter. WinStar Wireless of Florida, Inc. ("WinStar"), through its undersigned counsel, files this response to GTE's motion and urges the Commission to deny the motion.

I. INTRODUCTION

At 3:00 p.m. Friday afternoon, January 17, GTE served on WinStar a motion to dismiss count 1 of the arbitration petition which is scheduled to be heard by this Commission at 9:30 on Thursday, January 23, 1997. Count 1 addresses the issue of whether the Commission should require GTE to include a most-favored-nation clause ("M-F-N") in its interconnection and resale agreement with WinStar which would permit WinStar to adopt specific provisions of arbitrated and negotiated agreements between GTE and other parties, without requiring it to adopt the entire agreement.

The sole basis for this late filed motion appears to be the Commission's vote to adopt, without comment, Staff's recommendation in a separate arbitration between Sprint and GTE that stated: "It is not necessary for the Commission to vote on this issue. The Commission is not required to interpret 47 U.S.C. § 252(i) to fulfill its arbitration responsibilities." (emphasis added)[1] GTE then argues that the Commission made a legal, not a factual, decision in the Sprint Petition proceeding and that the decision reached in that proceeding should be followed here to conserve Commission resources.[2]

There simply is no basis for GTE's position in the record before this Commission in this proceeding. The fact that the Commission in a separate arbitration may have decided that in the circumstances of that particular case it was not required to determine whether in that case to require the inclusion of a most-favored-nation provision clearly does not bind the Commission in this case. This Commission has made clear that its decisions in its arbitration cases under the 1996 Act apply to the particular parties before the Commission and the record in that proceeding. GTE appears to argue that the Commission's decision not to rule on an issue in one arbitration is grounds for dismissing, without a hearing or exploration of the facts, an issue in an unrelated proceeding.

GTE in its argument appears to seek to read the Commission's mind with respect to a decision the Commission has yet to write. Whatever the particular circumstances in the Sprint

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[1] Petition of Sprint Communications Company Limited Partnership d/b/a/ Sprint for Arbitration with GTE Florida Incorporated Concerning Interconnection Rates, Terms and Conditions, pursuant to the Federal Telecommunications Act of 1996, Docket No. 961173-TP ("Sprint Petition"), Staff Recommendation at 77.

[2] GTE Motion to Dismiss at 2.

petition proceeding, they are, at least, just that -- the particular circumstances in that proceeding. GTE has not attempted to demonstrate that the factual circumstances in that case are the same as, or even similar to, the facts in this case.

WinStar will testify in this proceeding that its circumstances markedly differ from other ALECs, including Sprint, which have arbitrated issues before this Commission both in terms of WinStar's use of a different technology (microwave rather than fiber optics) and its relative size. WinStar is today virtually unique among competitive local exchange carriers in that it provides local services on a point-to-point basis using wireless, digital millimeter wave capacity in the 38 gigahertz ("GHz") band. As a result of these factors, WinStar, from the inception of the negotiations, made it clear to GTE that a M-F-N clause consistent with the 1996 Act's requirement to make available

> "any interconnection, service or network element provided under an agreement approved under this section to which it is a party to any other requesting telecommunications carrier upon the same terms and conditions as those provided in the agreement." (emphasis added)[3]

was an essential element of an Agreement.

WinStar in this negotiation, as well as those it has had and successfully completed with numerous incumbent local exchange carriers, has used a M-F-N provision as a proxy for negotiations of the myriad individual pricing elements. As the record will demonstrate this fact was fully known by GTE, and, both parties acted accordingly until the eve of the close of the arbitration window.

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[3] Telecommunications Act of 1996, Pub. L. No. 104-104, 100 Stat. 56 (1996) ("1996 Act") at § 252(i).

As discussed below, there is no question that the inclusion and form of a M-F-N provision is an appropriate issue for arbitration in this proceeding. For whatever reason the Commission may have determined that it was not necessary for the Commission to vote on the issue of an appropriate M-F-N in the Sprint Petition, it should not determine the issue of whether it will do so here without providing WinStar the opportunity to present evidence on the facts and circumstances surrounding the role and necessity of an M-F-N providing WinStar with the right to select terms in this case. The evidence will show that WinStar's particular circumstances effect the manner in which 252(i), as it relates to 251 and 252, must be interpreted in this proceeding.

II. THE IMPLEMENTATION OF THE M-F-N PROVISION OF THE ACT IS ARBITRABLE

This Commission has held that arbitration is appropriate for all "items enumerated in sections 251 and 252 [of the 1996 Act], and matters necessary to implement those items."[4] The question of the inclusion of appropriate M-F-N provisions in an interconnection agreement between WinStar and GTE is clearly arbitrable as the M-F-N requirement is contained in section 252(i) of the Act. Moreover, the M-F-N issue falls within the requirements of section 251(c). Specifically, sections 251(c)(2)(D) ("Interconnection"), 251(c)(3) ("Unbundled Access"), 251(c)(4) ("Resale") and 251(c)(6) ("Collocation"), each impose the duty on incumbents to provide the designated services or elements to any requesting telecommunications carrier on

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[4] In the Matter of Metropolitan Fiber Systems of Florida, Inc.'s Petition For Arbitration of Certain Terms and Conditions of a Proposed Agreement with Central Telephone Company of Florida and United Telephone Company of Florida Concerning Interconnection and Resale under the Telecommunications Act of 1996, Docket No. 960838-TP, Order No. PSC-96-1321-FOF-TP, at 3 (October 30, 1996).

rates, terms, and conditions that are nondiscriminatory and in accord with Section 252. Conformity with the M-F-N mandate of section 252 is therefore a requirement under section 251(c). As such, the issue between the parties concerning the form of a M-F-N provision in their interconnection agreement is an issue which is appropriate for the Commission to arbitrate.

Moreover, in the particular circumstances of this case, the issues surrounding the M-F-N provisions are central to what WinStar understood to be the negotiated bargain. Given WinStar's unique technology and relative size, it sought, and believed until just prior to the arbitration deadline, that it had agreement on M-F-N provisions which would authorize it to select individual rates, terms and/or conditions currently made available to other carriers or which are subsequently negotiated by GTE and other carriers, or imposed by arbitrated decisions involving GTE and other Florida carriers. An interpretation of the M-F-N which would require WinStar to adopt rates, terms or conditions made available to other carriers only if the entire agreement is adopted would, as a practical matter, effectively negate WinStar's ability to ever invoke the M-F-N clause,[5] and effectively constitute the very discrimination forbidden by Section 251.

III. THE ACT REQUIRES A "PICK AND CHOOSE" APPROACH TO PREVENT DISCRIMINATION

As WinStar will demonstrate, the history of the WinStar/GTE negotiations clearly illustrate WinStar's reliance, understanding and belief, from the very beginning of the

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[5]For example, as no other wireless CLECs appear to be negotiating interconnection agreements, it is highly unlikely that any other agreements, i.e., those being negotiated by fiber-based carriers, will contain provisions critical to WinStar such as microwave collocation, and access to roofs and risers. So, too, given WinStar's relatively small size, it could never accept in toto an agreement with, for example, a given volume and term discount for a particular resale product or a particular unbundled element, which a far larger carrier might voluntarily negotiate.

negotiations, that the completed agreement would include M-F-N provisions which would permit WinStar to select from provisions GTE agrees to or is required to provide other carriers. WinStar has negotiated agreements with other BOCs, and other ILECs containing such provisions. Because WinStar's 38 GHz wireless technology differs completely from the fiber optic based transport technology employed by wireline carriers, a provision allowing WinStar to select terms and conditions provided to other carriers on an item by item basis, rather than purely as a single overall package, is essential. Absent such a provision, WinStar would effectively be denied the opportunities provided to other ALECs.

WinStar's position is fully supported by the Act. The Act provides WinStar with the opportunity to utilize the rates and terms of negotiated or arbitrated interconnection agreements either in their entirety or individually and separately. The Act provides:

> A local exchange carrier shall make available any interconnection, service, or network element provided under an agreement approved under [§ 252] to which it is a party to any other requesting telecommunications carrier upon the same terms and conditions as those provided in the agreement. Act § 252(i) (emphasis added).

There is nothing in the language of this section to suggest that agreements must be made available to other carriers only in their entirety. The language on its face states that carriers may select *any* interconnection, any service or any network element on the same terms and conditions as it is offered to another carrier in an approved agreement. By using the phrase "any interconnection, service, or element," Congress clearly intended ALECs to be able to access relevant portions of agreements without having to accept every term of an agreement. A potential competitor must be able to request from an LEC any contractual provision obtained from that LEC by another competitor, without thereby being obliged to assume all other terms of

the LEC's existing agreement. The provision distinguishes between an "agreement" and "any interconnection, service, or network element" available under the agreement. Compelling requesting carriers to elect entire agreements instead of particular services or network elements under such agreements would drain the phrase "any interconnection, service, or network element" of meaning. The importance Congress placed on this is underscored by the Act's requirement that existing agreements between LECs be filed with state commissions.[6] Clearly, Congress intended that agreements with other LECs be made public so that incumbent LECs not be in a position to discriminate between incumbent LECs and new entrants. GTE's refusal to include the "LEC or" phrase WinStar sought in the M-F-N provision it ultimately proposed illustrates its unwillingness to accept the requirements of the 1996 Act intended to prevent discrimination. Indeed, the Senate Committee on Commerce, Science, and Transportation in considering the 1996 Act, stated that section 252(i) was intended to "make interconnection more efficient by making available to other carriers the individual elements of agreements that have been previously negotiated."[7] The use of the phrase "individual elements of agreements" clearly supports the conclusion that negotiated agreements are generally to be made available to other carriers on an item-by-item basis.

WinStar will present evidence demonstrating that WinStar's wireless technology requires collocation through rooftop access, access to rooftops as a means of distribution, and utilizes wireless meets for interconnection. In these circumstances, a decision that the Act only requires

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[6]1996 Act § 252(h).

[7]Senate Committee on Commerce, Science, and Transportation, S. Rep. No. 23, 104th Cong., 1st Sess. 21-22 (Mar. 23, 1995) (emphasis added).

an LEC to make a previously negotiated agreement available in its entirety to subsequent requesting carriers effectively would preclude a wireless ALEC, such as WinStar, from obtaining the benefits of an interconnection agreement between a LEC and a wireline ALEC. Differences in technology must not be used as a means to prevent or delay WinStar in obtaining interconnection terms that are available to other ALECs entering the market.[8]

Congress understood that it would be more difficult for LECs to discriminate against individual ALECs if the terms of the agreements, collectively and singly, were open to all requesting carriers. In this respect section 252(i) is one of the Act's primary tools to prevent incumbent LECs from discriminating against (and among) new entrants. Section 252(i) must be viewed as a shield to protect new entrants, not as a sword to be wielded against new entrants by incumbent LECs.

An M-F-N clause is essential to maximizing competition by ensuring that carriers obtain access to terms and elements on a nondiscriminatory basis. In fact, there is a M-F-N in WinStar's partial agreement with GTE's sister company, GTE-California, governing transit rates. In addition, GTE included a most favored nation clause in the February 19, 1996 MFS/GTE Partial Florida Co-Carrier Agreement, and the August 6, 1996 MFS/GTE Partial Florida Co-Carrier which both GTE and MFS signed and submitted to this Commission for approval after the passage of the 1996 Act. GTE's refusal as of August 21 to include any M-F-N, and only

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[8]Similarly, because of its relative size, WinStar may not be in a position to meet various volume and term requirements under agreements entered into by larger carriers. Under GTE's theory, since WinStar could not meet these terms, the provisions of these agreements would not be available to WinStar. Such an interpretation would make no sense in practice. Because new entrants have different needs, few, if any, would find it useful to purchase the precise bundle of services or elements contained in agreement between an incumbent LEC and another entrant.

subsequently to include an M-F-N, which it interpreted as providing for the adoption of all terms or condition, is discriminatory in violation of Sections 251 and 252. WinStar's testimony will show that the history of the GTE/WinStar negotiations evidence WinStar's reliance on an M-F-N that allows for item-by-item choice as a proxy for the parties separate negotiations over every term of the agreement, particularly prices. The inclusion of an M-F-N clause permitting the selection of individual elements of approved agreements is essential to ensure WinStar's ability to enforce its right to receive nondiscriminatory treatment from GTE, a right to which WinStar is entitled under the 1996 Act.

IV. CONCLUSION

For the foregoing reasons, the Commission should deny GTE's motion to dismiss issue 1 without receiving evidence of the facts and circumstances in this case as without merit.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I hereby certify that copies of WinStar Wireless of Florida, Inc.'s Reply to GTE Motion to Dismiss Issue No. 1 in Docket 960979-TP were sent via facsimile on January 22, 1997, to the parties listed below.

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