ORIGINAL
FILE COPY

Marceil Morrell**
Vice President & General Counsel - Florida

Associate General Counsel
Anthony P. Gillman**
Leslie Reicin Stein*

Attorneys*
Kimberly Caswell
M. Eric Edgington
Ernesto Mayor, Jr.

* Licensed in Florida
** Certified in Florida as Authorized House Counsel

GTE Telephone Operations

One Tampa City Center
201 North Franklin Street, FLTC0007
Post Office Box 110
Tampa, Florida 33601
813-483-2606
813-204-8870 (Facsimile)

December 23, 1996

Ms. Blanca S. Bayo, Director
Division of Records & Reporting
Florida Public Service Commission
2540 Shumard Oak Boulevard
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 GTE Florida Incorporated's Response Brief for filing in the above matter. Also enclosed are an original and fifteen copies of the Direct Testimony of Beverly Y. Menard. Service has been made as indicated on the Certificate of Service. If there are any questions regarding this matter, please contact me at (813) 483-2615.

ACK
AFA
APP
CAF
CMU
CTR
EAG
LEG 1
LIN 3 +1
OPC
RCH
SEC 1
WAS
OTH

Very truly yours,

Anthony P. Gillman

APG:tas
Enclosures

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Petition by WinStar Wireless of Florida, Inc. For Arbitration Pursuant to 47 U.S.C. §252(b) for the Establishment of Interconnection Rates, Terms and Conditions with GTE Florida Incorporated	Docket No. 960979-TP Filed: December 23, 1996

BRIEF OF GTE FLORIDA INCORPORATED IN RESPONSE TO THE PETITION FOR ARBITRATION OF WINSTAR WIRELESS OF FLORIDA, INC.

In accordance with the scheduling order issued by the Florida Public Service Commission, GTE Florida Incorporated (GTE) files this brief in response to the request by WinStar Wireless of Florida, Inc. (WinStar) to include a "most favored nation" provision in its interconnection agreement with GTE[1] and to locate its transceivers on GTE's rooftops.

Introduction

GTE has agreed to a most-favored nation (MFN) clause which requires GTE to provide WinStar any fully negotiated contract GTE has with another ALEC. This MFN clause is consistent with Section 251(i) of the *Telecommunications Act of 1996* (Act), the purpose of which is to prevent incumbent LECs from discriminating among carriers. Thus,

[1] As an initial matter, the Commission is not obligated to even decide this issue in arbitration proceedings filed under the *Telecommunications Act of 1996*. The Act only obligates the Commission to ensure that the requirements of Section 251 are met, to establish rates for interconnection, services or network elements and to provide a scheduled for implementation of the terms and conditions of the parties. 47 U.S.C. §252(c). Because MFN provisions are not required pursuant to section 251, are not rates and do not involve implementation, the Commission need not decide this issue for the parties.

if an ILEC negotiates an agreement with one ALEC, the ILEC is required to offer that same negotiated agreement to any other ALEC.

WinStar, however, is not satisfied with obtaining the same contract agreed to by another ALEC. Rather, WinStar demands the right to pick-and-choose those contractual provisions it likes in a particular contract and reject those it does not. WinStar's aim is to take isolated provisions from numerous contracts to create a new agreement without ever entering into negotiations with GTE. WinStar's "pick-and-choose" proposal eviscerates the give and take process which is the hallmark of negotiated agreements. See e.g., John D. Calamari & Joseph M. Perillo, Contracts, §1-3 at 6 (3d ed. 1987). In fact, WinStar's proposal renders meaningless the Act's intent to encourage negotiations among ILECs and ALECs. WinStar's position was rejected by the Court of Appeals for the Eighth Circuit in its order staying the MFN rule adopted by the FCC. See Iowa Board, et al. v. Federal Communications Commission, No. 96-3406 (8th Cir. October 15, 1996).[2] This Commission must follow the lead of the Court of Appeals and deny WinStar's proposed pick-and-choose MFN clause.

WinStar also requests access to GTE rooftops as part of GTE's right-of-way. The FCC Order does not require GTE to provide access to its roofs to ALECs. However, if

---

[2] The Eighth Circuit's decision staying the First Report and Order is binding nationwide. The Eighth Circuit was selected pursuant to the "lottery statute," 28 U.S.C. § 2112(a), as the only Court of Appeals to hear the multiple petitions for review that were filed after the publication of the First Report and Order. Under the "lottery statute," the Eighth Circuit was chosen at random to hear all petitions for review and related matters, including the stay requests. Pursuant to the "lottery statute," no other court will be authorized to consider a review of the First Report and Order. That means that the Court's Order is binding on this and every Commission and State.

GTE provides access to roof space or riser capacity in a particular building it owns or controls to another entity for provision of radio-based communications services, GTE will provide access on a first-come first-served basis, subject in all cases to GTE's normal request process. To require GTE to do more than this would constitute a taking under the 5th and 14th Amendments.

Argument

I. The Eighth Circuit Court of Appeals Has Rejected WinStar's Position In Granting a Stay of the FCC Order.

WinStar's position is essentially the same as the position taken by the FCC in its First Report and Order. See In re Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, First Report and Order CC Docket No. 96-98, FCC 96-325 (released August 8, 1996). The FCC's "pick-and-choose" rule (Rule 51.809) would have allowed a competitive local exchange carrier to "cherry pick" favorable provisions from a variety of different agreements, without regard to the arbitration or negotiation of the agreement. Like WinStar's request, the FCC went well beyond the express terms of the Act in approving its pick-and-choose rule.

GTE and other parties challenged the FCC's Order and sought a stay of the FCC's pick-and-choose rule. GTE argued that adoption of such a rule would cause irreparable injury. The Court of Appeals agreed, holding that the FCC's pick-and-choose rule would cause irreparable injury by "further undercut[ting] any agreements that are actually negotiated or arbitrated." (Order at 17). In ordering the Stay, the Court of Appeals

acknowledged the destabilizing impact of MFN clauses. The Court summarized GTE's position:

> The petitioners' objection is that the rule would permit the carriers seeking entry into a local market to "pick and choose" the lowest-priced individual elements and services they need from among all of the prior approved agreements between that LEC and other carriers, taking one element and its price from one agreement and another element and its price from a different approved agreement. Moreover, if an LEC and Carrier A, for example, reach an approved agreement, and then the LEC and a subsequent entrant, Carrier B, agree in their agreement to a lower price for one of the elements or services provided for in the LEC's agreement with Carrier A, Carrier A will be able to demand that its agreement be modified to reflect the lower cost negotiated in the agreement with Carrier B. Consequently, the petitioners assert that the congressional preference for negotiated agreements would be undermined because an agreement would never be finally binding, and the whole methodology for negotiated and arbitrated agreements would be thereby destabilized.

(Order at 12). The Court also recognized that the FCC's pick-and-choose rule was negatively impacting negotiations among ILECs and ALECs. The Court continued:

> We are persuaded . . . by the petitioners' evidence that the negotiations preferred by the Congress are already breaking down . . . . These experiences indicate that the FCC's pricing rules will derail current efforts to negotiate and arbitrate agreements under the Act, and the "pick and choose" rule will operate to further undercut any agreements that are actually negotiated or arbitrated. The inability of the incumbent LECs and the state commissions to effectively negotiate and arbitrate agreements free from the influence of the FCC's pricing rules, including the "pick and choose" rule, will irreparably injure the interests of the petitioners

Id. at 17 (emphasis added). Holding that the FCC's rules, including its rule on MFN clauses, would stymie "the opportunity for effective private negotiations," the Court issued an order staying these rules. (Order at 17).

GTE remains willing to offer WinStar any contract fully negotiated with another ALEC. WinStar's insistence on being able to fashion an entirely new contract by selecting

the most favorable terms of other contracts severely inhibits GTE from negotiating individual provisions with WinStar or any other carrier. As the Court of Appeals has recognized, WinStar's request for a MFN clause that would allow it to pick-and-choose from individual contract provisions should be denied.

II. GTE Has Offered WinStar a MFN Clause That Is Consistent With the Act and Preserves the Negotiation Process.

WinStar appears to allege that GTE is discriminating against it by refusing to include an MFN clause in its agreement with WinStar. Any such suggestion is entirely without merit. GTE has offered WinStar the same MFN clause it agreed to with MFS Communications of Florida, Inc. (MFS). The Agreement, dated February 19, 1996 (MFS/GTE Partial Florida Co-Carrier Agreement[3]), provides:

> If, at any time while this agreement is in effect, either of the parties to this agreement provides arrangements similar to those described herein to a third party operating within the same LATAs (including associated Extended Area Service Zones in adjacent LATAs) as for which this agreement applies, on terms different from those available under this agreement (provided that the third party is authorized to provide local exchange services), then the other party to this agreement may opt to adopt the rates, terms and conditions offered to the third party for its own reciprocal arrangements with that first party. This option may be exercised by delivering written notice to the first party.

---

[3] The MFS/GTE Partial Florida Co-Carrier Agreement was approved by the Commission in In re: Resolution of Petition(s) to Establish Nondiscriminatory Rates, Terms and Conditions for Resale Involving Local Exchange Companies and Alternative Local Exchange Companies Pursuant to Section 364.161, Florida Statutes, Docket No. 950984-TP and In re: Resolution of Petition(s) to Establish Nondiscriminatory Rates, Terms, and Conditions for Interconnection Involving Local Exchange Companies and Alternative Local Exchange Companies Pursuant to Section 364.162, Florida Statutes, Docket No. 960985-TP.

On August 12, 1996, GTE entered a subsequent agreement with MFS which superseded the first agreement attached as Exhibit A. That agreement, entitled Interim Interconnection and Unbundling Agreement, included an MFN clause identical to that contained in the earlier Agreement. The second Agreement was filed with the Commission in Docket No. 961090-TP.

Although argued otherwise by WinStar, GTE has offered WinStar the same MFN clause agreed to by MFS. It is WinStar who refuses to accept the MFS language. Instead, WinStar seeks to add a phrase which materially changes the provision. WinStar has steadfastly demanded that GTE's MFN clause be modified to provide:

> If, at any time while this agreement is in effect, either of the parties to this agreement provides arrangements similar to those described herein to a third party operating within the same LATAs (including associated Extended Area Service Zones in adjacent LATAs) as for which this agreement applies, on terms different from those available under this agreement (provided that the third party is authorized to provide local exchange services), then the other party to this agreement may opt to adopt either in whole or in part the rates, terms and conditions offered to the third party for its own reciprocal arrangements with that first party. This option may be exercised by delivering written notice to the first party.

(see Exhibit E to WinStar's Petition at 31, Art. XVI) (emphasis added).[4] The additional phrase "either in whole or in part" radically changes the provision agreed to with MFS. Under the MFS agreements approved by the Commission, MFS could choose to adopt the rates, terms and conditions contained in any fully negotiated agreement with any other

---

[4] WinStar also seeks to include specific MFN provisions with respect to particular sections of the agreement and add "or LEC" language in specified sections throughout the agreement. These proposals raise the same issues under Section 252(i). Regardless of what language is proposed by WinStar, if such language permits WinStar to pick and choose from agreements entered with telecommunications carriers under Section 252, it goes beyond the parameters of subsection (i) and may not be imposed upon GTE.

third party. However, MFS was required to adopt all of the terms and conditions contained in the contract. It is not permitted to select isolated provisions from several agreements, as WinStar requests.

The fact that WinStar is a wireless provider (whereas GTE has, as of the present date, only entered into agreements with wireline providers) is not relevant. GTE is not mandating that WinStar assume, without any negotiations, the entire agreement entered with MFS or any other carrier, wireline or not. WinStar is free to negotiate its own terms with GTE to meet any unique technical requirements WinStar may have. Indeed, the purpose of the Act is to encourage such negotiations among individual companies. However, WinStar has shown no willingness to negotiate its own terms as intended by the Act. Rather than negotiating, WinStar wants the unfettered discretion to pick any particular provision out of any contract (even those entered with wireline customers) and unilaterally thrust it upon GTE.

It is also immaterial if WinStar was able to enter a pick-and-choose agreement with another carrier or whether the Commission approved agreements among other carriers containing pick and choose provisions. Clearly, the Act gives ILECs broad discretion to enter any agreement they wish, including those with pick-and-choose MFN clauses. However, the Act does not require ILECs to agree to such clauses. As recognized by the Eighth Circuit Court of Appeals, requiring GTE and other ILECs to agree to pick-and-choose MFN provisions is contrary to the intent of Congress and will undercut the entire negotiation process. (Order at 17).

III. GTE Should Not Be Required to Provide WinStar Access to Its Rooftops.

A. The FCC Order Does Not Require GTE to Provide Access to Its Rooftops

The FCC makes a distinction between access for collocation and access for rights of way. In the context of collocation, the FCC at ¶ 582 required incumbent LECs to allow physical collocation for microwave transmission facilities except where it is not practical for technical reasons or because of space limitations. Moreover, the FCC did not require access to every rooftop under the ownership or control of the LEC in the context of access to rights-of-way. Furthermore, rooftop access was made specific only to the collocation of microwave facilities. In the FCC Order at ¶ 576, the FCC stated that section 251(c)(6) requires incumbent LECs to allow collocation of "equipment necessary for interconnection or access to unbundled elements...." Microwave transmission equipment was specifically identified in ¶ 582 as a type of necessary equipment. GTE has included this requirement in the WinStar Agreement in Section III.G.

In the section of the Order addressing Access to Rights of Way, the FCC states that:

> we do not believe that section 224(f)(1) mandates that a utility make a space available on the roof of its corporate offices for the installation of a telecommunications carrier's transmission tower, although access of this nature might be mandated pursuant to a request for interconnection or for access to unbundled elements under section 251(c)(6). The intent of Congress in section 224(f) was to permit cable operators and telecommunications carriers to "piggyback" along distribution networks owned or controlled by utilities, as opposed to granting access to every piece of equipment or real property owned or controlled by the utility.

FCC Order at ¶ 1185. The FCC appears to clearly differentiate the use of rooftop access for collocation purposes versus the granting of access to every piece of real property

owned or controlled by the utility. Moreover, GTE's rooftops are not the only or even the best rooftops suitable for the placement of transmission towers. Many other rooftops could be used by WinStar, and there is nothing to prevent WinStar from making its own arrangements with other building owners for placement of transmission towers.

In addition, WinStar's request for access to roofs in non-GTE buildings should be denied because there is no evidence that Congress intended to expand the meaning of the term "right-of-way", as used in section 224, to include all possible "pathways" to the end-user customer. Instead, it clarified the scope of section 224(f)(1) by limiting it to an entity's ability to "piggyback" along distribution networks to the extent they are owned or controlled by the utility. The rooftop pathways WinStar refers to are not part of GTE's distribution network such that only GTE can grant access to them. These "pathways" generally are not owned or controlled by GTE. Again, there is nothing to prevent WinStar from making its own arrangements with building owners for placement of transmission towers.

B. To Require GTE To Provide Access to its Rooftops Would Constitute a Taking Under the 5th and 14th Amendments.

If the Act were interpreted to require GTE to provide access to its rooftops as WinStar requests, then the Act would effect a taking of GTE's property without just compensation, in violation of the Fifth and Fourteenth Amendments of the U.S. Constitution as well as Article 10, Section 6 and Article 1, Section 9 of the Florida Constitution.

Under familiar principles of statutory construction, such an interpretation must be avoided because the Commission must read the Act to avoid serious constitutional questions. See, e.g., Rust v. Sullivan, 500 U.S. 173, 190-91 (1991); Ashwander v. Tennessee Valley Authority, 297 U.S. 288, 347 (1936) (Brandeis, J., concurring). Indeed, in the specific context of takings, the Supreme Court has admonished that if an "identifiable class of cases [exists] in which application of a statute will necessarily constitute a taking," then concerns for avoiding uncompensated takings properly require a narrowing construction of the statute. United States v. Riverside Bayview Homes, Inc., 474 U.S. 121, 128 n.5 (1985).

As we demonstrate below, under a physical occupation analysis, the Act would effect an unconstitutional taking if it were interpreted to require GTE to provide access to its rooftops. Thus, to avoid constitutional infirmity, the Commission must read the Act as not requiring GTE to provide WinStar with access to GTE's rooftops.

In Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419 (1982), the Supreme Court held that a New York law requiring a landlord to permit installation of cable television equipment on rental property was a constitutionally compensable taking. The Court held that, while "no 'set formula' existed to determine, in all cases, whether [government regulation of private property constitutes a taking]," where the government authorizes a permanent physical occupation of one's property by a third party, a taking is determinatively established. Id. at 426. The Court held that the law at issue in Loretto plainly amounted to a taking by a physical occupation because the "installation involved

a direct physical attachment of the cable company's equipment to the owner's property. Id. at 438.

The Supreme Court revisited the application of takings principles by permanent physical occupation to highly regulated industries in FCC v. Florida Power Corp., 480 U.S. 245 (1987). In that case, a utility company challenged on takings grounds the provisions of the Pole Attachments Act that authorized the FCC to set the rates that utility companies could charge cable television companies for using their utility poles for stringing television cable. The Court held that:

> Loretto ha[d] no applications to the facts of [Florida Power -- and there was no taking by physical occupation – because while] the statute we considered in Loretto specifically required landlords to permit permanent occupation of their property by cable companies, nothing in the Pole Attachments Act as interpreted by the FCC . . . gives cable companies any right to occupy space on utility poles, or prohibits utility companies from refusing to enter into attachment agreements with cable operators.

Id. at 250-51 (emphasis added).

In other words, where, as in Florida Power, the property owner voluntarily invites the third party onto its property (by lease or otherwise), there is no permanent physical occupation mandated by the government and hence no taking for that reason, and the government is free to regulate the terms of the lease or other invitation (i.e., regulate the use of the property) without effecting a per se taking by physical occupation. Or, as the Supreme Court put it, the "element of required acquiescence is at the heart of the concept of [per se taking by physical] occupation." Id. at 252. See also Yee v. Escondido, 503 U.S. 519, 527 (1992) ("required acquiescence is at the heart of the concept of [taking by physical] occupation").

This issue has been squarely addressed by the Oregon Supreme Court, which held that physical collocation amounts to a taking by permanent physical invasion. In GTE Northwest Inc. v. Public Util. Comm'n of Oregon, 321 Ore. 458, 468-77, 900 P.2d 495, 501-06 (1995), cert. denied, 116 S.Ct. 1541 (1996), the Supreme Court of Oregon held that state-mandated collocation rules effected an unconstitutional physical taking. Id. The Court reasoned that when the government requires a physical intrusion into one's property that reaches the extreme form of a permanent physical occupation, a taking has occurred. Id.[5]

Applying these well-settled principles here, it is plain that any obligation imposed on GTE to provide access to its rooftops would constitute a physical occupation. Rooftop access as a physical collocation amounts to an installment and direct physical attachment to GTE's property. Cf. Loretto, 458 U.S. at 438. There is no question that a third party -- as opposed to GTE -- would have an exclusive property interest in the space on GTE's premises. See Id. at 440 n.19. And there is no question that, unlike in Florida Power and Yee, a requirement that GTE provides access to its rooftops would allow third parties to physically occupy GTE's premises. Thus, this case falls squarely within the per se takings rule of Loretto, as clarified in Florida Power and Yee.

---

[5] The one federal court to address this issue has agreed that physical collocation "would seem necessarily to 'take' property regardless of the public interests served in a particular case." Bell Atlantic Tel. Cos. v. FCC, 24 F.3d 1441, 1446 (D.C. Cir. 1994). The D.C. Circuit did not, however, have to reach the taking issue because that court concluded that the FCC did not have the statutory authority to order physical collocation.

Conclusion

As held by the Eighth Circuit, pick and choose MFN provisions are contrary to the unambiguous language of section 252(i) of the Act and severely impede the ability of the parties to negotiate voluntary agreements. Although GTE has offered the same MFN provision contained in the MFS/GTE Partial Florida Co-Carrier Agreement and Interim Interconnection and Unbundling Agreement, WinStar has steadfastly refused to consider such a provision. The MFN clause contained in those two contracts are consistent with Section 252(i) of the Act. WinStar's proposed clause is not.

WinStar's proposal of requiring GTE to provide access to its rooftops for the location of WinStar's transmission equipment is not required by the FCC's Order and would clearly amount to a per se taking by physical occupation of GTE's premises.

For the forgoing reasons, WinStar's requests for a pick-and-choose MFN clause and access to GTE's rooftops should be denied.

Respectfully submitted on December 23, 1996.

Anthony P. Gillman
Kimberly Caswell
P. O. Box 110, FLTC0007
Tampa, Florida 33601-0110
Telephone No. (813) 483-2615

Attorneys for GTE Florida Incorporated

GTE FLORIDA INCORPORATED

DIRECT TESTIMONY OF BEVERLY Y. MENARD

DOCKET NO. 960979-TP

Q. PLEASE STATE YOUR NAME, BUSINESS ADDRESS AND POSITION WITH GTE FLORIDA INCORPORATED (GTEFL).

A. My name is Beverly Y. Menard. My business address is One Tampa City Center, Tampa, Florida 33601-0110. My current position is Regional Director - Regulatory and Industry Affairs.

Q. WILL YOU BRIEFLY STATE YOUR EDUCATIONAL BACKGROUND AND BUSINESS EXPERIENCE?

A. I joined GTEFL in February 1969. I was employed in the Business Relations Department from 1969 to 1978, holding various positions of increasing responsibility, primarily in the area of cost separations studies. I graduated from the University of South Florida in June of 1973 receiving a Bachelor of Arts Degree in Business Administration with an Accounting Major. Subsequently, I received a Master of Accountancy Degree in December of 1977 from the University of South Florida. In March of 1978, I became Settlements Planning Administrator with GTE Service Corporation. In January of 1981, I was named Manager-Division of Revenues with GTE Service Corporation, where I was responsible for the administration of the GTE division of revenues procedures and the negotiation of settlement matters with AT&T. In November of 1981, I became

Business Relations Director with GTEFL. In that capacity, I was responsible for the preparation of seperations studies and connecting company matters. Effective February 1987, I became Revenue Planning Director. In this capacity, I was responsible for revenue, capital recovery and regulatory issues. On October 1, 1988, I became Area Director - Regulatory and Industry Affairs. In that capacity, I was responsible for regulatory filings, positions and industry affairs in eight southern states plus Florida. In August 1991, I became Regional Director - Regulatory and Industry Affairs for Florida. I am responsible for regulatory filings, positions and industry affairs issues in Florida.

Q. HAVE YOU EVER TESTIFIED BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION?

A. Yes. I have testified before this Commission on numerous occasions.

Q. WHAT IS THE PURPOSE OF YOUR TESTIMONY?

A. The purpose of my testimony is to present GTE's positions on the issues in this docket.

Q. HAVE YOU BEEN INVOLVED IN THE INTERCONNECTION NEGOTIATIONS BETWEEN GTE AND WINSTAR?

A. Yes. I have conducted the negotiations with WinStar on behalf of GTE since WinStar's initial request for interconnection.

Q. ARE THERE SPECIFIC ISSUES IN DISPUTE WITH RESPECT TO "MOST FAVORED NATION" TREATMENT?

A. Yes. WinStar's position is that, as required by the FCC's Order, any price, term and/or condition offered to any carrier by an ILEC shall be made available to WinStar on a most favored nation's ("MFN") basis and the ILEC shall immediately notify WinStar of the existence of such better prices and/or terms and make the same available to WinStar effective on the date the better price and/or term became available to the other carrier. WinStar's position is based solely upon Rule 51.809.

Q. HOW IS WINSTAR'S "MFN" POSITION CONTRARY TO THE ACT?

A. WinStar asserts under the guise of "non-discrimination" in prices that it is entitled to "pick and choose" those portions of an agreement between GTE and any other ALEC, and have it inserted into its agreement. In other words, it wants to make sure it gets the same or better terms than any other ALEC. This is contrary to the purposes of the Act.

The Act was designed to encourage negotiation between the parties and specified arbitration of only the subset of unresolved issues as a last resort. Inherent in the negotiation process are trade-offs: e.g., Party A will concede on issue X if Party B will agree to A's position on issue Y. Particular issues may be more important to WinStar for example, than for another potential entrant. Thus, the negotiations

between WinStar and GTE would produce an agreement that might be quite different than as between GTE and another ALEC.

WinStar, however, does not want negotiation and compromise. It wants "most favored nation" treatment so that all the material terms in the agreements will be the same among the ALECs. In other words, WinStar wants to "pick and choose" from various ALEC agreements in order to obtain individual contract terms that are most favorable to WinStar without allowing GTE any say in the matter. This result is, of course the very opposite of negotiation.

WinStar's position – if accepted by this Commission – would destroy the negotiation process. The Eighth Circuit's Stay was intended to prevent such an occurance.

GTE's position is that each agreement is the product of comprehensive negotiations. Any party desiring to obtain the terms of another agreement must abide by that agreement in its entirety.

Q. SHOULD THE PRICES, TERMS AND/OR CONDITIONS UNDER WHICH SERVICES OR FACILITIES ARE PROVIDED BY GTE TO ONE CARRIER BE MADE AVAILABLE TO ALL CARRIERS?

A. No. The FCC Order did not intend to usurp the negotiation process by incenting the ability for ALECs to "pick and choose" terms in any and all agreements. Any normal sound business contract would not

include a most favored nation clause because an agreement would never be finally binding. To do so would eliminate any and all incentives of the negotiation process and the individuality of each request. Each ALEC is unique and asking to negotiate for terms, conditions and rates that are appropriate to their individual requests based on their individual requirements. The process of negotiating individual agreements is fundamental to establishing a fully competitive market place.

Q. HOW DOES GTE VIEW ACCESS TO ROOFTOPS OF BUILDINGS IT OWNS OR CONTROLS?

A. GTE views access to rooftops the same way as the FCC did in Regarding Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, First Report and Order, CC Docket No. 96-98, FCC 96-325 (released Aug. 8, 1996) (the Order)

Q. DID THE FCC SPECIFICALLY ADDRESS ACCESS TO ROOFTOPS IN THE ORDER?

A. Yes. The FCC addressed access to rooftops both from the context of collocation and access to rights of way.

Q. DID THE FCC MAKE A DISTINCTION BETWEEN ACCESS FOR COLLOCATION AND ACCESS FOR RIGHTS OF WAY?

A. Yes. At ¶ 592, they required incumbent LECs to allow physical collocation for microwave transmission facilities except where this is

not practical for technical reasons or because of space limitations. Moreover, the FCC did not require access to every rooftop under the ownership or control of the LEC in the examination of access to rights-of-way.

Q. WAS THE ROOFTOP ACCESS REQUIREMENT SPECIFIC TO COLLOCATION OF MICROWAVE FACILITIES?

A Yes. At ¶ 576, the FCC stated that Section 251(c)(6) requires incumbent LECs to allow collocation of "equipment necessary for interconnection or access to unbundled elements...." Microwave transmission equipment was specifically identified in ¶ 582 as a type of necessary equipment. GTE has included this requirement in the WinStar Agreement in Section III.G.

Q. WHAT DOES THE ORDER REQUIRE REGARDING ACCESS TO GTE'S RIGHTS-OF-WAY?

A. The FCC, in ¶ 1119 of the Order, states that section 251(b)(4) imposes upon each LEC the "duty to afford access to the poles, ducts, conduits, and rights-of-way of such carrier to competing providers of telecommunications services on rates, terms, and conditions that are consistent with section 224."

Q. WINSTAR APPEARS TO BELIEVE IT SHOULD HAVE ACCESS TO ROOFTOPS AS PART OF GTE'S RIGHT OF WAY ENVISIONED BY

THAT SECTION OF THE ORDER. DOES GTE AGREE WITH THAT VIEW?

A. No. At ¶ 1185, the FCC states that

> "we do not believe that section 224(f)(1) mandates that a utility make a space available on the roof of its corporate offices for the installation of a telecommunications carrier's transmission tower, although access of this nature might be mandated pursuant to a request for interconnection or for access to unbundled elements under section 251(c)(6). The intent of Congress in section 224(f) was to permit cable operators and telecommunications carriers to 'piggyback' along distribution networks owned or controlled by utilities, as opposed to granting access to every piece of equipment or real property owned or controlled by the utility."

The FCC clearly differentiates in this section the use of rooftop access for collocation purposes versus the granting of access to every piece of real property owned or controlled by the utility.

Q. DOES THE ACT DIVEST GTE OF ANY OF ITS PROPERTY RIGHTS?

A. No. GTE maintains that the Act did not divest GTE of its property rights. Therefore, WinStar's access to GTE's property, including rooftops, necessarily must be subject to certain limitations.

Q. WOULD A REQUIREMENT THAT GTE PROVIDE ROOFTOP ACCESS TO WINSTAR CONSTITUTE A TAKING UNDER THE 5TH AND 14TH AMENDMENTS?

A. The Act's requirement that utilities grant access to their facilities constitutes a taking of private property for public use without just compensation. GTE's takings analysis is set forth in more detail in its Response to WinStar's Arbitration Petition. In brief, however, I am told by GTE's lawyers that, prior to the Act, section 224 was determined to pass constitutional muster by the U.S. Supreme Court expressly because it did not require that access be granted. Rather, it merely authorized the FCC to review the rents charged by public utility landlords who had voluntarily entered into leases with cable company tenants. The Court made it clear, however, that if section 224 mandated access, it would constitute a taking in violation of the Fifth Amendment.

Q. IS ACCESS TO GTE ROOFTOPS NECESSARY FOR WINSTAR TO BE ABLE TO TRANSMIT ITS SIGNALS?

A. No. GTE rooftops are not the only or even the best locations suitable for the placement of WinStar's transmission towers. Many other and in many cases, better rooftops are available to WinStar, and there is

nothing to prevent WinStar from making its own arrangements with other building owners for placement of transmission towers.

Q. IS GTE REFUSING WINSTAR ACCESS TO ROOFTOPS OF BUILDINGS IT OWNS OR CONTROLS?

A. No. If GTE provides access to roof space or riser capacity in a particular building it owns or controls to another entity for provision of radio-based communications services, GTE will provide access to roof space and/or riser capacity that it owns or controls on a first-come, first-serve basis; subject, in all cases to GTE's normal request processes based on the evaluation of operational issues, including, but not limited to capacity, potential interference, roof loading, power requirements, and protection grounding, which approval shall not be unreasonably withheld.

Q. DO YOU AGREE WITH MR. BERGER'S CHARACTERIZATION OF THE AUGUST 22 AGREEMENT AS DISCUSSED ON PAGE 11 OF HIS TESTIMONY?

A. No. I agree that GTE's initial position on this issue had been that it would not allow any access to roofs it owned or controlled for any purposes. For this reason, GTE had refused to include WinStar's proposed language from their August 5, 1996 letter which stated

> "In addition, if either Party provides access to roof space or riser capacity in a particular building it owns or controls to another entity for provision of radio-based

communications services, the Party providing such access shall make that roof space or riser capacity in that same building available to the other Party on non-discriminatory terms, conditions and prices comparable to those offered to such other entity."

During negotiations, GTE stated that its policy had changed and that it would consider requests for roof access. However, GTE does not believe that access to roofs is included in the FCC's requirements for rights-of-way and GTE cannot agree that WinStar can unilaterally demand access to any GTE roof. In an effort to reach a compromise, GTE has agreed to include WinStar's previously proposed language. The proposed GTE language in the WinStar agreement (Section XIV) reflects WinStar's August 5, 1996 proposed language in addition to GTE's proposed requirements to provide roof and riser space subject to GTE's normal request procedure (which basically involves ensuring that there are no structural or similar issues) on a first come first served basis, and that permission would not be unreasonably withheld.

Q. MR. BERGER, IN HIS TESTIMONY ON PAGE 12, INDICATES THAT THE OBLIGATION TO PROVIDE ACCESS TO ROOFS ON A NON-DISCRIMINATORY BASIS IS UNAMBIGUOUS AND UNRESERVED. DOES GTE AGREE WITH THAT PRESUMPTION?

A. No. In fact the so-called "obligation" must be somewhat ambiguous because WinStar filed a petition for clarification and reconsideration in CC Docket No. 96-98 that asked the FCC to clarify WinStar's right to locate its microwave equipment on the roof of utility premises and to utilize related riser conduit owned or controlled by the utility.

Q. MR. SIMONS, ON PAGE 4 OF HIS TESTIMONY, INDICATES THAT "YOU CANNOT SERVICE CUSTOMERS IN A BUILDING USING OUR WIRELESS TECHNOLOGY, IF YOU CAN'T HAVE ACCESS TO THE ROOF." IS HE REQUESTING GTE PROVIDE ACCESS TO ROOFS OF CUSTOMER BUILDINGS IT NEITHER OWNS NOR CONTROLS?

A. It appears that he is. This appears to fit the expensive definition of a "pathway" that other ALECs have brought forth rather than a "right-of-way". GTE does not own or control access to roofs in non-GTE buildings.

Q. DOES THE ACT CONFER ON WINSTAR A RIGHT OF ACCESS TO ALL POSSIBLE "PATHWAYS" TO END USER CUSTOMERS?

A. No. There is no evidence that Congress intended to expand the meaning of the term "right-of-way", as used in section 224, to include all possible "pathways" to the end-user customer. Further, the Florida Public Service Commission has found in other arbitrations that the term "right-of-way" does not include all possible pathways. See In re Request by AT&T Communications of the South for Arbitration

Pursuant to the Telecommunications Act of 1996, Docket No. 960847-TP (Staff Recommendation at 176).

Q. DOES THE FCC'S ORDER SUPPORT GTE'S POSITION ON THE PATHWAY ISSUE?

A. Yes. In the Order, as previously stated, the FCC concluded that the intent of Congress in section 224(f) was to permit cable operators and telecommunications carriers to "piggyback" along distribution networks owned or controlled by utilities, as opposed to granting access to every piece of equipment or real property owned or controlled by the utility. Had the FCC intended to adopt WinStar's expansive interpretation of "rights-of-way" to include all possible "pathways" to the end-user customer, it would have done so. Instead, it clarified the scope of section 224(f)(1) by limiting it to an entity's ability to "piggyback" along distribution networks to the extent they are owned or controlled by the utility.

Q. ARE THE ROOFTOP PATHWAYS WINSTAR REFERS TO PART OF GTE'S NETWORK, SUCH THAT ONLY GTE CAN GRANT ACCESS TO THEM?

A. No. Rooftops as identified by WinStar are not part of the distribution network used to place GTE's facilities. These "pathways" generally are not owned or controlled by GTE. There is nothing to prevent WinStar from making its own arrangements with building owners for placement of microwave towers.

Q. DOES THIS CONCLUDE YOUR TESTIMONY?

A. Yes, it does.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that copies of GTE Florida Incorporated's Response Brief and Direct Testimony of Beverly Y. Menard in Docket No. 960979-TP were sent via overnight delivery on December 23, 1996, to the parties listed below.

Martha Brown
Division of Legal Services
Florida Public Service Commission
2540 Shumard Oak Boulevard
Tallahassee, FL 32399-0850

Robert Berger
WinStar Communications, Inc.
1146 19th Street, N.W., Suite 250
Washington, DC 20036

Dana Frix/Kathy Cooper
Swidler & Berlin
3000 K Street, N.W., Suite 300
Washington, DC 20007-5116

Anthony Gillman

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that copies of GTE Florida Incorporated's Response Brief and Direct Testimony of Beverly Y. Menard in Docket No. 960979-TP were sent via overnight delivery on December 23, 1996, to the parties listed below.

Martha Brown
Division of Legal Services
Florida Public Service Commission
2540 Shumard Oak Boulevard
Tallahassee, FL 32399-0850

Robert Berger
WinStar Communications, Inc.
1146 19th Street, N.W., Suite 250
Washington, DC 20036

Dana Frix/Kathy Cooper
Swidler & Berlin
3000 K Street, N.W., Suite 300
Washington, DC 20007-5116

Anthony Gillman

13636-96
12/23/96