

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In Re: Petition by WinStar) DOCKET NO. 960979-TP
Wireless of Florida, Inc. for) ORDER NO. PSC-97-0059-PHO-TP
arbitration of certain terms and) ISSUED: January 16, 1997
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.)

Pursuant to Notice, a Prehearing Conference was held on January 10, 1996, in Tallahassee, Florida, before Commissioner Diane K. Kiesling, as Prehearing Officer.

APPEARANCES:

Richard M. Rindler, Esquire, Swidler & Berlin, Chartered
3000 K Street, N.W., Suite 300, Washington, D.C.
20007-5116
On behalf of WinStar Wireless of Florida, Inc..

Anthony P. Gillman, Esquire and Kimberly Caswell,
Esquire, Post Office Box 110, FLTC0007, Tampa, Florida
33601
On behalf of GTE Florida Incorporated.

Martha Carter Brown, Esquire, Florida Public Service
Commission, 2540 Shumard Oak Boulevard, Tallahassee,
Florida 32399-0850
On behalf of the Commission Staff.

PREHEARING ORDER

I. CASE BACKGROUND

On August 26, 1996, WinStar Wireless of Florida, Inc. (WinStar) filed a petition for arbitration of certain terms and conditions of a proposed interconnection and resale agreement with GTE Florida Incorporated (GTEFL), pursuant to the provisions of 47 USC Section 252(b) of the Telecommunications Act of 1996. The parties initially agreed that the issues presented by the petition could be addressed by the Commission in an informal proceeding

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pursuant to the provisions of Section 120.57(2), Florida Statutes. The parties were unable, however, to agree to a stipulation of material facts upon which they would base briefs on the issues for the Commission's consideration. They now request an evidentiary hearing on the issues pursuant to the provisions of Section 120.57(1), Florida Statutes. Accordingly, a hearing has been scheduled for January 23, 1997.

II. PROCEDURE FOR HANDLING CONFIDENTIAL INFORMATION

A. Any information provided pursuant to a discovery request for which proprietary confidential business information status is requested shall be treated by the Commission and the parties as confidential. The information shall be exempt from Section 119.07(1), Florida Statutes, pending a formal ruling on such request by the Commission, or upon the return of the information to the person providing the information. If no determination of confidentiality has been made and the information has not been used in the proceeding, it shall be returned expeditiously to the person providing the information. If a determination of confidentiality has been made and the information was not entered into the record of the proceeding, it shall be returned to the person providing the information within the time periods set forth in Section 364.183(2), Florida Statutes.

B. It is the policy of the Florida Public Service Commission that all Commission hearings be open to the public at all times. The Commission also recognizes its obligation pursuant to Section 364.183, Florida Statutes, to protect proprietary confidential business information from disclosure outside the proceeding.

In the event it becomes necessary to use confidential information during the hearing, the following procedures will be observed:

- 1) Any party wishing to use any proprietary confidential business information, as that term is defined in Section 364.183, Florida Statutes, shall notify the Prehearing Officer and all parties of record by the time of the Prehearing Conference, or if not known at that time, no later than seven (7) days prior to the beginning of the hearing. The notice shall include a procedure to assure that the confidential nature of the information is preserved as required by statute.
- 2) Failure of any party to comply with 1) above shall be grounds to deny the party the opportunity to

present evidence which is proprietary confidential business information.

- 3) When confidential information is used in the hearing, parties must have copies for the Commissioners, necessary staff, and the Court Reporter, in envelopes clearly marked with the nature of the contents. Any party wishing to examine the confidential material that is not subject to an order granting confidentiality shall be provided a copy in the same fashion as provided to the Commissioners, subject to execution of any appropriate protective agreement with the owner of the material.
- 4) Counsel and witnesses are cautioned to avoid verbalizing confidential information in such a way that would compromise the confidential information. Therefore, confidential information should be presented by written exhibit when reasonably possible to do so.
- 5) At the conclusion of that portion of the hearing that involves confidential information, all copies of confidential exhibits shall be returned to the proffering party. If a confidential exhibit has been admitted into evidence, the copy provided to the Court Reporter shall be retained in the Division of Records and Reporting confidential files.

Post-hearing procedures

Rule 25-22.056(3), Florida Administrative Code, requires each party to file a post-hearing statement of issues and positions. A summary of each position of no more than 50 words, set off with asterisks, shall be included in that statement. If a party's position has not changed since the issuance of the prehearing order, the post-hearing statement may simply restate the prehearing position; however, if the prehearing position is longer than 50 words, it must be reduced to no more than 50 words. The rule also provides that if a party fails to file a post-hearing statement in conformance with the rule, that party shall have waived all issues and may be dismissed from the proceeding.

A party's proposed findings of fact and conclusions of law, if any, statement of issues and positions, and brief, shall together total no more than 60 pages, and shall be filed at the same time.

The prehearing officer may modify the page limit for good cause shown. Please see Rule 25-22.056, Florida Administrative Code, for other requirements pertaining to post-hearing filings.

III. PREFILED TESTIMONY AND EXHIBITS

Testimony of all witnesses to be sponsored by the parties (and Staff) has been prefiled. All testimony which has been prefiled in this case will be inserted into the record as though read after the witness has taken the stand and affirmed the correctness of the testimony and associated exhibits. All testimony remains subject to appropriate objections. Each witness will have the opportunity to orally summarize his or her testimony at the time he or she takes the stand. Upon insertion of a witness' testimony, exhibits appended thereto may be marked for identification. After all parties and Staff have had the opportunity to object and cross-examine, the exhibit may be moved into the record. All other exhibits may be similarly identified and entered into the record at the appropriate time during the hearing.

Witnesses are reminded that, on cross-examination, responses to questions calling for a simple yes or no answer shall be so answered first, after which the witness may explain his or her answer.

IV. ORDER OF WITNESSES

<u>WITNESS</u>	<u>APPEARING FOR</u>	<u>ISSUES</u>
<u>Direct</u>		
Robert G. Berger*	WinStar	All
George Simons	WinStar	All
Beverly Menard	GTEFL	All
<u>Supplemental Direct</u>		
Robert G. Berger*	WinStar	All
<u>Rebuttal</u>		
Robert G. Berger*	WinStar	All

* The parties agree that the direct, supplemental and rebuttal testimony of Robert G. Berger will be combined at the hearing.

V. BASIC POSITIONS

WINSTAR: WinStar seeks Commission arbitration of two unresolved issues in its arbitration with GTE on interconnection rates, terms, and conditions. WinStar believes that its interconnection agreement with GTE must include a most favored nation provision allowing WinStar to obtain any term or provision GTE provides to another carrier through negotiation, arbitration or other Commission, FCC or court action without adopting the remaining provisions of such agreements. WinStar also believes that its interconnection agreement with GTE must provide for access to GTE owned or controlled roofs for the purpose of the placement of WinStar distribution equipment for purposes other than interconnection or access to unbundled elements. Both of these provisions should be included pursuant to the terms of the Telecommunications Act of 1996.

The language of the Telecommunications Act of 1996, 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.

Because of its technology and relative size WinStar's circumstances underscore the appropriateness of the Act's requirement that an ALEC be able to obtain any terms in another agreement between the ILEC and a competing carrier. The most favored nation provision is a common commercial provision which is designed to assure parties that they will not be disadvantaged if a seller or employer offers a better price or term to a third party. It fundamentally prevents discrimination between parties.

Under Section 251(a)(4), GTE is required to afford access to rights-of-way to competing providers of telecommunications services on rates, terms and conditions consistent with Section 224 of the Communications Act of 1934. Where a utility has access to a roof, such access is a "right-of-way" within the meaning of 224 and other telecommunications carriers, including wireless carriers, such as WinStar, have a right of nondiscriminatory access under Section 224(f)(1). GTE provides no reasonable basis to distinguish access to roofs it owns or controls for placement of WinStar's distribution equipment from access

to other rights-of-way. GTE's refusal to provide such access is clearly discriminatory.

GTEFL: Section 252(i) of the Telecommunications Act of 1996 (Act) requires incumbent local exchange carriers (ILECs) to "make available any interconnection service, or network element provided under an agreement approved under this section (section 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." See 47 U.S.C. §252(i) (parenthetical added). This subsection of the Act does not permit alternative local exchange carriers (ALECs) to pick-and-choose those contractual provisions it likes in a particular contract and reject those it does not. WinStar desires to take isolated provisions from numerous contracts to create a new and better agreement without ever entering into negotiations with GTE. WinStar's "pick-and-choose" proposal, which eviscerates the give and take process which is the hallmark of negotiated agreements, 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).

WinStar also requests access to GTE rooftops as part of GTE's right-of-way. Neither the Act nor the FCC's First Report and Order requires GTE to provide access to its roofs to WinStar and other ALECs for purposes other than interconnection with its facilities. If GTE provides access to roof space in a particular building it owns or controls, it should only be provided as part of collocation on a first-come first served basis and 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 of the United States Constitution and Article 10, Section 6 and Article 1, Section 9 of the Florida Constitution.

STAFF: Staff has no basic position at this time.

VI. ISSUES AND POSITIONS

ISSUE 1: Should the Commission require GTE to include a "most-favored-nations" clause in its interconnection and resale agreement with WinStar, where such a clause would permit WinStar to unilaterally adopt specific provision of GTE's arbitrated and negotiated agreements with other parties without adopting the remaining provisions of such agreements?

POSITIONS

WINSTAR: Yes. The appropriate most favored nation provision is one which permits WinStar to utilize any term or condition contained in an interconnection agreement GTE has entered into with any other local exchange service provider.

GTEFL: The Commission is not obligated to decide this issue in arbitration proceedings filed under the Act. 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 schedule 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.

However, if the Commission decides this issue, it should not permit WinStar to "pick-and-choose" any provision from any agreement entered with any ALEC without even allowing GTE any say in the matter. This same position was rejected by the Eighth Circuit Court of Appeals, which stayed the FCC's pick and choose rule upon which WinStar relies. GTE remains willing to offer WinStar any contract fully negotiated with another ALEC or to negotiate a contract specific to it

STAFF: No position at this time.

ISSUE 2: Should the Commission require GTE to provide access to the roofs of buildings it owns or controls for purposes other than interconnection with its facilities?

WINSTAR: Yes. WinStar should be provided access to any GTE owned or controlled roof for the purpose of placing its telecommunications distribution equipment.

GTEFL: GTE should not be required to provide WinStar access to its rooftops for purposes other than interconnection with its facilities. The FCC Order does not require GTE to provide such access. The FCC makes a distinction between access for collocation and access for rights of way. In the context of collocation, the FCC 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. (Order at ¶ 582). GTE is willing to include this requirement and has done so in the WinStar Agreement (see Section III.G).

WinStar's request for access to roofs in GTE buildings for access for purposes other than collocation or access to non-GTE buildings should be denied. 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. The rooftop pathways WinStar refers to are not part of GTE's distribution network and are not owned or controlled by GTE.

If the Commission interprets the Act to require GTE to provide access to its rooftops as WinStar requests, the Commission 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.

STAFF: No position at this time.

VII. EXHIBIT LIST

<u>WITNESS</u>	<u>PROFFERED BY:</u>	<u>I.D. NO.</u>	<u>DESCRIPTION</u>
Robert G. Berger	WinStar	_____ (RGB-1)	Interconnection Request Letter
Robert G. Berger	WinStar	_____ (RGB-2)	MFS/GTE February 19, 1996 Co-Carrier Agreement
		_____ (RGB-3)	RGB August 22, 1996 Memorandum re WinStar Interconnection conference call of August 22, 4:00 p.m.
		_____ (RGB-4)	A August 22, 1997 Memorandum re WinStar/GTE Florida Interconnection Negotiations
		_____ (RGB-5)	The August 20 MFS/GTE Florida Interconnection Agreement
		_____ (RGB-6)	WinStar/GTE November 21, 1996 Interconnection Agreement
George Simons		_____ (GS-1)	A depiction of WinStar's distribution equipment

Parties and Staff reserve the right to identify additional exhibits for the purpose of cross-examination.

VIII. PROPOSED STIPULATIONS

None.

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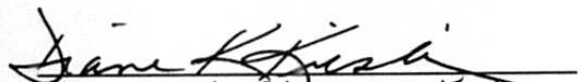
IX. PENDING MOTIONS

None.

It is therefore,

ORDERED by Commissioner Diane K. Kiesling, as Prehearing Officer, that this Prehearing Order shall govern the conduct of these proceedings as set forth above unless modified by the Commission.

By ORDER of Commissioner Diane K. Kiesling, as Prehearing Officer, this 16th day of January, 1997.


Diane K. Kiesling, Commissioner
and Prehearing Officer

(S E A L)

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NOTICE OF FURTHER PROCEEDINGS OR JUDICIAL REVIEW

The Florida Public Service Commission is required by Section 120.59(4), Florida Statutes, to notify parties of any administrative hearing or judicial review of Commission orders that is available under Sections 120.57 or 120.68, Florida Statutes, as well as the procedures and time limits that apply. This notice should not be construed to mean all requests for an administrative hearing or judicial review will be granted or result in the relief sought.

Any party adversely affected by this order, which is preliminary, procedural or intermediate in nature, may request: 1) reconsideration within 10 days pursuant to Rule 25-22.038(2), Florida Administrative Code, if issued by a Prehearing Officer; 2) reconsideration within 15 days pursuant to Rule 25-22.060, Florida

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Administrative Code, if issued by the Commission; or 3) judicial review by the Florida Supreme Court, in the case of an electric, gas or telephone utility, or the First District Court of Appeal, in the case of a water or wastewater utility. A motion for reconsideration shall be filed with the Director, Division of Records and Reporting, in the form prescribed by Rule 25-22.060, Florida Administrative Code. Judicial review of a preliminary, procedural or intermediate ruling or order is available if review of the final action will not provide an adequate remedy. Such review may be requested from the appropriate court, as described above, pursuant to Rule 9.100, Florida Rules of Appellate Procedure.