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FILE COPY

January 3, 1997

VIA FEDERAL EXPRESS

Ms. Blanca S. Bayo
Director, Division of Records and Reporting
Florida Public Service Commission
2540 Shumard Oak Boulevard
Tallahassee, Florida 32399

Re: Docket No. 960979-TP

Dear Mrs. Bayo:

Enclosed for filing are an original and fifteen (15) copies each of a Prehearing Statement of WinStar Wireless of Florida, Inc. and Rebuttal Testimony of Robert G. Berger in the above-captioned docket.

A copy of the Prehearing Statement is also on the enclosed diskette formatted in WordPerfect 6.1 for Windows. Please date stamp the extra copy and return it in the enclosed self-addressed envelope.

Thank you for your attention to this matter.

Sincerely,



Richard M. Rindler

- ACK _____
- AEA _____
- APP _____
- CAF _____
- CMU 3/2/97 All parties of record
- CTR _____
- EAG _____
- LEG 1
- LIN 3108
- OPC _____
- PCH _____
- SEC 1 154910 II
- WAS _____
- OTH _____

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Prehearing Statement
DOCUMENT NUMBER-DATE

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1000 K STREET, N.W. WASHINGTON, D.C. 20007-5116
00079 JAN-65

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**REBUTTAL TESTIMONY OF ROBERT G. BERGER
ON BEHALF OF
WINSTAR WIRELESS OF FLORIDA, INC.**

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960979

1 **Q. PLEASE STATE YOUR NAME FOR THE RECORD.**

2 **A. Robert G. Berger.**

3 **Q. ARE YOU THE SAME ROBERT G. BERGER WHO FILED DIRECT AND**
4 **SUPPLEMENTAL TESTIMONY IN THIS PROCEEDING?**

5 **A. Yes.**

6 **Q. WHAT IS THE PURPOSE OF YOUR TESTIMONY?**

7 **A. To respond to the factual testimony of Beverly Y. Menard filed on behalf of GTE Florida.**

8 **Q. WHAT DO YOU MEAN WHEN YOU SAY YOU WILL RESPOND TO THE**
9 **FACTUAL TESTIMONY OF MS. MENARD?**

10 **A. Much of Ms. Menard's testimony consists of quasi-legal analysis, which we will respond**
11 **to in the post hearing brief to be filed in this proceeding.**

12 **Q. IN WHAT WAYS IS HER TESTIMONY INCONSISTENT WITH YOUR**
13 **UNDERSTANDING OF THE NEGOTIATIONS AND WINSTAR'S AND GTE'S**
14 **POSITIONS?**

15 **A. A couple of examples illustrate the way in which Ms. Menard's testimony is inconsistent**
16 **with my understanding of the negotiations. Ms. Menard states that WinStar "wants to**
17 **make sure it gets the same or better terms than any other ALEC." WinStar's position is**
18 **and has been throughout that it simply wants the opportunity afforded by the Act to**
19 **obtain the same terms made available to others.**

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FFSC-REG/REGS/REPORTING

1 Ms. Menard states in her testimony that "each ALEC is unique and asking to
2 negotiate for terms, conditions and rates that are appropriate to their individual requests
3 based on their individual requirements." Assuming the accuracy of that statement, it
4 becomes clear that what GTE really seeks to do is to make the most favored nation
5 provision contained in the Act meaningless. Since GTE views no two ALECs as alike, it
6 is clear that if an ALEC is required to take "all or nothing," it almost certainly will be left
7 with nothing. As we made clear before, this would certainly be the case with WinStar
8 which has specific needs dictated by its size and technology.

9 **Q. DO YOU AGREE WITH MS. MENARD'S DESCRIPTION OF THE M-F-N**
10 **LANGUAGE WINSTAR REQUESTED?**

11 A. No. During virtually the entire negotiations WinStar understood the MFS language to
12 permit an ALEC to obtain terms available to another ALEC. In an effort to remove any
13 doubt with respect to key provisions, WinStar requested that the language be further
14 clarified in two ways. First, the language itself was changed by adding the phrase "either
15 in whole or in part." Second, similar M-F-N language would be included with respect to
16 specific sections of the agreement. After initially incorporating such changes without
17 qualifications, GTE thereafter rejected this proposal making clear in the final days of the
18 160 day negotiation period that it now had an entirely different interpretation of the MFS
19 language which completely guts the M-F-N.

20 **Q. DO YOU HAVE ANY OTHER COMMENTS ON GTE'S M-F-N PROVISION?**

21 A. Yes. I find it revealing that Ms. Menard makes no effort to justify GTE's refusal to
22 provide WinStar even with the terms it enters into pursuant to a Commission ordered

1 provision in another carrier's agreement. GTE's theory that agreement provisions are a
2 result of a balancing of interests, certainly does not apply to arbitrated provisions or
3 provisions required by other Commission or court rulings.

4 **Q. IS IT YOUR EXPERIENCE AND UNDERSTANDING THAT**
5 **INTERCONNECTION AGREEMENTS ENTERED INTO BY NUMEROUS**
6 **INCUMBENTS AND NEW ENTRANTS CONTAIN BROAD M-F-N**
7 **PROVISIONS AND THAT IS THE CASE BOTH BEFORE AND AFTER THE**
8 **EIGHTH CIRCUIT STAY DECISION?**

9 **A. Yes. WinStar itself entered into six interconnection agreements, including four full 14**
10 **point checklist agreements before September 27 and eight after that date. Of these, all**
11 **twelve full agreements contain M-F-N clauses similar to that WinStar has sought from**
12 **GTE (excluding the agreement GTE and WinStar signed in Florida), including WinStar's**
13 **regionwide agreement with BellSouth. I am also aware that a large number of such**
14 **agreements have been entered into by other carriers.**

15 **Q. ARE THERE OTHER EXAMPLES OF DIFFERENCES BETWEEN YOUR**
16 **UNDERSTANDING OF THE NEGOTIATIONS AND MS. MENARD'S**
17 **TESTIMONY?**

18 **A. Yes. Ms. Menard's description of WinStar's position on access to rooftops is simply**
19 **wrong. WinStar has never suggested that GTE had any obligation to provide access to**
20 **buildings it neither owns or controls. Creating the classic strawman, Ms. Menard labels**
21 **WinStar's request as seeking access to "pathways," a term WinStar has never used.**
22 **Having created a request for pathways where none exists, Ms. Menard asserts that the**

1 Commission has determined that the Act does not cover pathways.

2 **Q. WHY DO YOU FEEL ACCESS TO ROOFTOPS FOR DISTRIBUTION IS**
3 **APPROPRIATE?**

4 **A. Given WinStar's technology, rooftops are directly analogous to rights-of-ways, conduit or**
5 **poles. To the extent GTE owns or controls a rooftop that may serve as an equipment site**
6 **for the WinStar network, that site bears the exact same relationship to WinStar's network**
7 **as rights-of-way, conduit or poles do to a wireline ALEC's distribution network. If GTE**
8 **is allowed to deny access to rooftops it owns or controls in GTE's territory, it is the same**
9 **as denying access to facilities like conduit, rights-of-way and poles to a wireline carrier.**

10 **Q. DOES WINSTAR MAKE ARRANGEMENT WITH BUILDING OWNERS**
11 **OTHER THAN ILECS FOR THE ROOFTOP PLACEMENT OF ITS**
12 **EQUIPMENT?**

13 **A. Yes, the vast majority of WinStar's facilities are deployed on rooftops that are not owned**
14 **or controlled by ILECs. WinStar has and expects to continue to negotiate with building**
15 **owners for access to such facilities. What we are talking about here -- rather than what**
16 **GTE has postulated -- is access to rooftops that GTE either owns or controls. To the**
17 **extent GTE denies access to rooftops it owns or controls, it is clearly seeking to both**
18 **increase a competitor's cost and at the same time to deny access to wireless ALECs to**
19 **non-GTE occupants of such buildings. By such a denial, WinStar effectively will be**
20 **prevented from using its technology to provide service to such non-GTE occupants.**
21 **Moreover, GTE through such a denial can also eliminate WinStar as a substitute provider**
22 **of links to a competitive carrier seeking to serve that building, thus reinforcing its**

1 existing monopoly.

2 **Q. HAS GTE PROVIDED ANY REASON WHY ACCESS TO ROOFTOPS OWNED**
3 **OR CONTROLLED BY GTE SHOULD NOT BE MADE AVAILABLE FOR A**
4 **FEE TO WINSTAR?**

5 A. No. Obviously, there are in any city numerous rights-of-way that a new entrant, wireline
6 or wireless, can use. There are conduits and frequently poles of other providers. GTE
7 postulates that before access for a fee can be required, the Commission must determine
8 that the facility is some form of essential facility. The Act simply doesn't require such a
9 finding for those facilities necessary for wireline local exchange carriers; nor does it
10 permit any parallel discrimination with respect to those facilities necessary for wireless
11 local exchange carriers.

12 **Q. WOULD WINSTAR DEMAND ACCESS IF THERE WERE LEGITIMATE,**
13 **IDENTIFIABLE ENGINEERING OR SAFETY CONCERNS?**

14 A. No.

15 **Q. HAS WINSTAR OBTAINED SUCH ACCESS FROM ANY OTHER ILECS?**

16 A. Virtually all of WinStar's full interconnection agreements provide for such access.

17 **Q. DOES THIS CONCLUDE YOUR TESTIMONY?**

18 A. Yes.