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January 6, 1997

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:

ACK _____ Please find enclosed an original and fifteen copies of GTE Florida Incorporated's
AFA _____ Prehearing Statement for filing in the above matter. Also enclosed is a diskette with a
APP _____ copy of the Prehearing Statement in WordPerfect 5.1 format. Service has been made
CAF _____ as indicated on the Certificate of Service. If there are any questions regarding this
GTM *Caswell* matter, please contact me at (813) 483-2615.

CTR _____ Very truly yours,

EAG _____
LER _____ *Anthony P. Gillman*
LIM _____ Anthony P. Gillman

PCS _____
PEP _____ APG:tas
SEP _____ Enclosures

WFS _____
OTH _____

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BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: 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 6, 1997

GTE FLORIDA INCORPORATED'S PREHEARING STATEMENT

In accordance with the Commission's Procedural Order issued in this case, GTE Florida Incorporated (GTE) hereby files its Prehearing Statement:

A. Witnesses

GTE intends to call Beverly Y. Menard who will testify on all issues in this proceeding.

B. Exhibits

At the present time, GTEFL has not identified any exhibits which will be introduced into evidence. However, GTEFL reserves the right to introduce such exhibits at the hearing and to use exhibits sponsored by other witnesses for any purpose permitted by this Commission's Rules and the Florida Rules of Evidence.

C. Statement of Basic Position

Section 252(i) of the Telecommunications Act of 1996 (Act) requires incumbent local exchange carriers (ILECs) to "make available any interconnection service, or network

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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's aim, by seeking adoption of its proposed most-favored nations (MFN) clause, is 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 eviscerates the give and take process which is the hallmark of negotiated agreements. 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). This Commission must follow the lead of the Court of Appeals and deny WinStar's proposed pick-and-choose MFN clause.

GTE has agreed to an MFN provision which permits WinStar to adopt a fully negotiated agreement entered with any other ALEC. Such a provision ensures that WinStar is not treated in a non-discriminatory manner and is consistent with Section 252(i) of the Act.

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, as is being demanded by WinStar, 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.

D, E, F. GTEFL's Positions on Specific Issues

GTE considers the two issues in this proceeding to be mixed questions of fact, law, and policy. GTE's specific positions on these two issues are set forth below:

Issue 1: Should the Commission require GTE to include a "most favored nations" clause in its interconnection and resale agreement with WinStar which permits WinStar to unilaterally adopt specific provisions of arbitrated and negotiated agreements with other parties without adopting the remaining provisions of such agreements?

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. WinStar's position is 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 an ALEC 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. Recognizing this, the Eighth Circuit Court of Appeals stayed this section of the FCC rule, holding that the FCC's pick-and-choose rule (as well as other FCC provisions stayed by the Court) would cause irreparable injury to GTE and other incumbent LECs and would stymie "the opportunity for effective private negotiations." (Order at 17).

Although 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 agreements with WinStar or any other carrier. WinStar's proposed MFN provision usurps the negotiation process clearly intended by the Act, a process which is fundamental to establishing a fully competitive market place.

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?

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. 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. Like GTE, WinStar is fully capable of making its own arrangements with building owners for placement of transmission towers.

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. Under familiar principles of statutory construction, such an interpretation must be avoided because the Commission must read the Act to avoid serious constitutional questions. To avoid constitutional infirmity, the Commission must read the Act as not requiring GTE to provide WinStar with access to GTE's rooftops except for purposes of collocation of microwave facilities.

G. Stipulated Issues

No issues have been stipulated in this proceeding.

H. Pending Motions

There are no motions pending at the present time.

I. Compliance Statement

GTEFL is unaware of any requirement in the procedural orders in these consolidated cases with which it cannot comply.

Respectfully submitted on January 6, 1997.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that copies of GTE Florida Incorporated's Prehearing Statement in Docket No. 960979-TP were hand-delivered(*) or sent via overnight delivery(**) on January 6, 1997, to the parties listed below.

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