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VIA HAND-DELIVERY

Mr. William Caton  
Acting Secretary  
Federal Communications Commission  
1919 M Street, N.W., Room 222  
Washington, D.C. 20554

Re: *In Matter of Implementation of the Local Competition Provisions of the  
Telecommunications Act of 1996, CC Docket No. 96-98*

Dear Mr. Caton:

Enclosed is an original and sixteen copies of the Comments of WinStar Communications, Inc. in the above-captioned matter. Also enclosed is a copy to date-stamp and return in the self-addressed, stamped envelope.

Thank you for your attention to this matter.

Sincerely,



Dana Frix

Counsel to WinStar Communications, Inc.

Enclosures

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MAY 16 1996

FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF SECRETARY

May 16, 1996

**VIA MESSENGER**

Ms. Janice Myers  
Common Carrier Bureau  
Federal Communications Commission  
1919 M Street, N.W., Room 544  
Washington, D.C. 20554

**Re: Federal-State Joint Board on Universal Service; CC Docket No. 96-45**

Dear Ms. Myers:

Per the Commission's request, please find enclosed Comments of WinStar Communications, Inc. in the above-referenced docket. The enclosed comments are being submitted to you on a 3.5 diskette using an IBM compatible format in WordPerfect 5.1 for Windows software.

If you have any questions, please contact the undersigned.

Sincerely,



Dana Frix

Counsel to WinStar Communications Company, Inc.

Enclosure: 3.5 Inch Diskette

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Before the  
Federal Communications Commission  
Washington, D.C. 20054

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In the Matter of )  
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Implementation of the )  
Local Competition Provisions of the )  
Telecommunications Act of 1996 )

CC Docket No. 96-98

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MAY 16 1996

COMMENTS OF FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF SECRETARY  
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Dated: May 16, 1996

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**Table of Contents**

EXECUTIVE SUMMARY . . . . . iii

I. INTRODUCTION . . . . . 1

II. THE ACT ESTABLISHES WINSTAR’S RIGHT TO MOUNT TRANSMISSION FACILITIES, FOR PURPOSES OF INTERCONNECTION WITH THE LEC NETWORK, ON THE ROOFS OF LEC FACILITIES ON NONDISCRIMINATORY TERMS (NPRM, ¶¶ 66-73; 155-156) . . . . . 4

    A. WinStar Requires and Is Entitled to Access LEC Roofs and Riser Conduit . . . . . 4

    B. The Commission Should Establish Non-Discriminatory, Technologically-Neutral, National Collocation Standards—including a Standard Applicable to 38 GHz Carriers . . . . . 6

III. THE ACT REQUIRES INCUMBENT LECs TO FURNISH NEW ENTRANTS WITH NONDISCRIMINATORY TREATMENT IN SERVICE PROVISIONING AND SERVICE INTERVALS (NPRM, ¶¶ 60-63) . . . . . 11

IV. UNDER THE ACT THE COMMISSION’S INTERCONNECTION RULES SERVE AS BASELINE STANDARDS FOR THE NATION (NPRM, ¶¶ 50; 157) . . . . . 15

V. THE ACT REQUIRES THE TERMS OF NEGOTIATED OR ARBITRATED AGREEMENTS TO BE AVAILABLE TO ALL REQUESTING CARRIERS (NPRM, ¶¶ 269-72) . . . . . 17

VI. BILL AND KEEP IS AN APPROPRIATE METHOD OF RECIPROCAL COMPENSATION (NPRM, ¶¶ 239-43) . . . . . 20

    A. The Commission Should Mandate Bill and Keep Arrangements for Terminating Compensation on a Trial Basis (NPRM ¶¶ 239-43) . . . . . 21

    B. If the Commission Establishes Bill and Keep Arrangements Between CMRS Providers and LECs in CC Docket No. 95-185, It Must Clarify that All Local Exchange Carriers May Transport CMRS Traffic and Interconnect to LECs (For the Purpose of Terminating CMRS Traffic) Under the Same Bill and Keep Arrangements (NPRM, ¶¶ 166-69; 195; 230) . . . . . 23

**Table of Contents Cont'd**

C. Transport and Traffic Termination Rates Must Be Symmetrical (NPRM, ¶¶ 235-38) . . . . . 24

VII. PRICING OF INTERCONNECTION AND UNBUNDLED NETWORK ELEMENTS UNDER § 252(d)(1) OF THE ACT (NPRM, ¶¶ 117-57) . . . . . 28

A. Rates for Interconnection and Unbundled Network Elements Must Not Include Contribution (NPRM, ¶ 121) . . . . . 29

B. Proxy-Based Ceilings Are Needed to Control the Pricing of Interconnection and Unbundled Network Elements on an Interim Basis until TSLRIC-Based Pricing Can Be Implemented over the Long-Term (NPRM, ¶¶ 124-25) . . . . . 31

C. Other Issues Related to Proxy-Based Ceilings (NPRM, ¶¶ 144-48) . . . . . 33

CONCLUSION . . . . . 42

EXHIBIT A: Photographs with Descriptions of WinStar's 38 GHz Transmission Equipment

## EXECUTIVE SUMMARY

WinStar's comments simultaneously target issues that have particular significance for fixed-point-to-point wireless carriers and also address issues of general importance to new entrants in the local exchange market. WinStar's comments deal with the following issues:

**Wireless New Entrants Are Entitled to Access LEC Roofs and Riser Conduit and Any Rights-of-Way Controlled by the Incumbent LEC:** To interconnect its wireless network with incumbent LECs, WinStar requires access, at nondiscriminatory rates, to the roofs of local exchange carrier ("LEC") buildings (for the placement of microwave transmission equipment) and associated riser conduit. Section 251(c)(6) of the Telecommunications Act of 1996 ("1996 Act" or "Act") establishes a technology-neutral interconnection standard, granting WinStar the right to mount its microwave transmission facilities on the "premises" of incumbent LECs. WinStar also has the right, under § 224 of the amended Communications Act of 1934, to access rights-of-way controlled, though not necessarily owned, by incumbent LECs.

**The Act Provides for Nondiscriminatory Provisioning and Service Intervals:** Section 251(c)(6) of the Act requires incumbent LECs to provision and service interconnection with new entrants at nondiscriminatory intervals. Because unreliable service provisioning and repair will mortally wound the efforts of new entrants to build goodwill and amass customers, WinStar advocates assessing liquidated damages against incumbent LECs that fail to meet specified, publicly disclosed provisioning and service intervals.

**The Commission's Interconnection Rules Will Be Baseline Standards for the Nation:** Congress has left no doubt that the Commission's interconnection standards under §§ 251 and 252 of the Act should serve as ground rules for the actions of state commissions. In no case may a state commission provide less favorable treatment than a carrier would otherwise receive under the Commission's rules.

**The Terms of Negotiated or Arbitrated Agreements Must Be Available Either Individually or in Their Entirety to Requesting Carriers:** Section 252(i) of the Act compels incumbent LECs to offer the individual terms of negotiated or arbitrated agreements to requesting carriers. The Act does not force requesting carriers, that do not wish to access an agreement in its entirety, to expend precious resources renegotiating, and perhaps arbitrating, new agreements.

**The Bill and Keep Method of Terminating Compensation Should Be Available on a Trial Basis:** The advantages of bill and keep as a method of terminating compensation militate in favor of implementing it on a 36-month trial basis. During this period, data regarding traffic balances and termination costs could be gathered to determine if bill and keep should be retained or replaced in the long-run.

**Non-CMRS Carriers Should Be Able to Transport and Terminate CMRS Traffic to Incumbent LECs on a Bill and Keep Basis:** If the Commission selects bill and keep as the appropriate method of reciprocal compensation between Commercial Mobile Radio Service (“CMRS”) providers and incumbent LECs in CC Docket No. 95-185, non-CMRS carriers should be able to transport and terminate CMRS traffic to incumbent LECs under the same bill and keep arrangements. This rule ensures that CMRS providers may use the most efficient means of transporting their traffic.

**The Commission Should Implement Pricing Standards That Exclude Contribution, Rely on Proxy-Based Ceilings on an Interim Basis and Move Toward TSLRIC-Based Pricing over the Long-Run:** In promulgating rules on the pricing standards of § 252(d) of the Act, the Commission should forbid states from including contribution in the rates for interconnection and network elements. In a competitive market, carriers recover contribution from the market itself, not from each other. The Commission properly understands that appropriate TSLRIC-based pricing will require accurate, updated cost studies. Until such studies are completed, WinStar agrees that proxy-based ceilings may be used to control the pricing decisions of incumbent LECs. WinStar supports adopting existing agreements between Regional Bell Operating Company (“RBOC”) affiliates serving neighboring jurisdictions as an appropriate proxy-based ceiling. WinStar opposes basing any proxy on either the Benchmark Costing Model, which is biased heavily in favor of wireline carriers, or current inter- or intrastate access charges which have tremendous potential to price squeeze new entrants.

**Before the  
Federal Communications Commission  
Washington, D.C. 20054**

In the Matter of	)	
	)	
Implementation of the	)	CC Docket No. 96-98
Local Competition Provisions of the	)	
Telecommunications Act of 1996	)	

**COMMENTS OF  
WINSTAR COMMUNICATIONS, INC.**

WinStar Communications, Inc. (“WinStar”), by its undersigned counsel and pursuant to Section 1.415 of the Commission’s rules, submits these comments in accordance with the Commission’s Notice of Proposed Rulemaking (“NPRM”) in the above captioned proceeding.

**I. INTRODUCTION**

WinStar is a publicly-held company traded on the NASDAQ. It develops, markets, and delivers telecommunications services in the United States. WinStar has grown rapidly over the last five years,<sup>1/</sup> and currently is authorized to provide facilities-based telecommunications service in the nation’s 43 largest metropolitan statistical areas. The Company provides local telecommunications services on a point-to-point basis using wireless, digital millimeter wave capacity in the 38 gigahertz (“GHz”) band, a configuration referred to by WinStar as Wireless Fiber<sup>SM</sup>.<sup>2/</sup> WinStar’s operating companies have been approved to offer competitive local exchange carrier services in California, Florida, Illinois, Massachusetts, New York, Tennessee, and Washington.

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<sup>1/</sup> WinStar had over 300 full-time employees in 1995 and expects to add significantly to its employee base in 1996.

<sup>2/</sup> WinStar’s Wireless Fiber<sup>SM</sup> networks are so named because of their ability to duplicate the technical characteristics of fiber optic cable with wireless 38 GHz microwave transmissions.

Applications for such authority also are pending in six additional states, including Arizona, Connecticut, Georgia, Maryland, Michigan, and Texas. In addition, WinStar's affiliates have received authority to operate as competitive access providers in 22 states<sup>3/</sup> and have applications pending in a number of other states.<sup>4/</sup> WinStar's wireless backbone provides it far greater flexibility and responsiveness than the traditional wireline networks of incumbent local exchange carriers. A separate WinStar subsidiary provides switched and switchless long distance services on a resale basis. The passage of the Telecommunications Act of 1996 ("1996 Act" or "Act")<sup>5/</sup> should hasten WinStar's ability to provide competitive services, particularly local exchange services.

With the passage of the Act, WinStar is in an excellent position to compete with incumbent local exchange carriers ("LECs"). WinStar's wireless network configuration is both more flexible than the networks of traditional wireline carriers and much more efficient.<sup>6/</sup> As the

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<sup>3/</sup> California, Colorado, Connecticut, Florida, Georgia, Illinois, Idaho, Indiana, Kansas, Maryland, Massachusetts, Michigan, Minnesota, Missouri, Nebraska, New York, Ohio, Pennsylvania, Tennessee, Texas, Washington, and Wisconsin.

<sup>4/</sup> States with pending applications include Arizona, Louisiana, New Jersey, New Mexico, North Carolina, Oklahoma, Oregon, Utah, and Virginia.

<sup>5/</sup> Telecommunications Act of 1996, Pub. L. No. 104-104, 100 Stat. 56 (1996).

<sup>6/</sup> Over the last several years, advances in 38 GHz technology have led to a substantial reduction in the cost and size of millimetric microwave components with a corresponding increase in reliability and quality. Wireless loops are capable of delivering the same type of high quality voice and data transmissions available over fiber optic networks. Unlike fiber optic and traditional copper wire facilities, however, 38 GHz equipment can be installed, deployed and redeployed with minimal time and expense. In addition to its own local exchange service, WinStar's network configurations are capable of providing call termination and origination services to interexchange carriers; connection of competitive access provider or LEC customers  
(continued...)

Indiana Utilities Regulatory Commission recently found in granting WinStar's application for authority to provide intrastate services, "the public should benefit . . . directly through the use of high-quality and reliable microwave transmission services . . . ." <sup>21</sup> WinStar plans to enter the local exchange market immediately as a facilities-based carrier, supplying its own switches and transport and, unlike many other new entrants, its own wireless local loops. WinStar's target market for switched local exchange users initially will consist of businesses (including small and mid-sized business customers), as well as congregate housing (*e.g.*, multi-tenant residential housing). Within the last six months, WinStar also has announced deals with, *inter alia*, MCI, Century Telephone, and Electric Lightwave, to provide those entities with non-switched competitive access services on a nationwide basis.

WinStar submits these comments to assist the Commission in understanding certain of the unique concerns of a fixed point-to-point wireless competitive local exchange carrier ("CLEC").

*Comments Continue on Next Page* 

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<sup>21</sup> (...continued)

to their fiber rings; connection and interconnection services to private networks operated by businesses, government or other institutions; backbone services for mobile service providers including delivery of traffic between and among cell sites, repeaters and the wireline local network; internet access; and cable headend applications.

<sup>21</sup> *Petition of WinStar Wireless of Indiana, Inc. for a Certificate of Territorial Authority, Order, Cause 4082, at 5 (Ind. Util. Reg. Comm. Jan. 31, 1996).*

**II. THE ACT ESTABLISHES WINSTAR'S RIGHT TO MOUNT TRANSMISSION FACILITIES, FOR PURPOSES OF INTERCONNECTION WITH THE LEC NETWORK, ON THE ROOFS OF LEC FACILITIES ON NONDISCRIMINATORY TERMS (NPRM, ¶¶ 66-73; 155-156)**

**A. WinStar Requires and Is Entitled to Access LEC Roofs and Riser Conduit**

In the emerging competitive telecommunications infrastructure, multiple technologies, including WinStar's wireless technology, will be utilized to meet customer demand and expectations. Choice of technology will be driven by a number of factors, including cost, reliability and performance. In order to maximize the potential for the development of a highly reliable, robust and diverse public switched telephone network, the Commission must ensure that the interconnection standards it adopts do not favor the use of wireline technology over wireless.

Like other CLECs, including wireline carriers, WinStar will maintain a collocation cage or other interconnection point in or near a LEC end office or tandem, which interconnects on the port side of the LEC's switching facilities. However, instead of running fiber optic cable from its premises to the LEC's switching facilities, WinStar will rely on microwave transmitters placed on the roofs of these buildings to interconnect its Wireless Fiber<sup>SM</sup> network with the incumbent LEC network. Thus, for WinStar to interconnect on the premises of a LEC, it must be able to mount its transmission facilities on the roofs of LEC end offices and tandems (both local and access tandems), and must be able to utilize riser conduit running from the roof to the LEC switching facilities.

The text of the Act establishes WinStar's right to utilize the roofs of incumbent LEC end offices and tandems when it states that collocation must be available "on the premises of the [incumbent] local exchange carrier." 1996 Act, § 251(c)(6). The Commission correctly concludes

that “premises” must be broadly construed to include *all* structures that house LEC network facilities.<sup>8/</sup> This is particularly important to WinStar, because technically and economically efficient interconnections necessarily will require in many instances that WinStar’s 38 GHz microwave transmission facilities be installed upon LEC roofs and appurtenances and that WinStar be allowed access to riser conduit from the roof to the interconnection point. As the Commission appears to recognize, the term “premises” must be construed broadly.<sup>9/</sup> There is no rational basis for permitting CLECs to install collocation cages or other interconnection-related equipment inside LEC end offices or tandems and forbidding them from placing microwave transmission facilities on the roofs of these very same buildings. Thus, in no event should the term “premises” be so narrowly construed by the Commission as to place in question WinStar’s right to access and utilize available LEC facilities and structures that are necessary for its 38 GHz microwave transmission facilities to provide local services.

Recognizing that the Commission has asked parties to address rights-of-way issues in separate comments, WinStar wishes to state its position briefly on access to rights-of-way and conduit controlled by LECs on or in non-LEC-owned buildings. Section 224(f)(1) of the Act requires an incumbent LEC to provide new entrants with nondiscriminatory access to any “pole,

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<sup>8/</sup> “[W]e tentatively conclude that ‘premises’ includes, in addition to incumbent LEC central offices or tandem offices, all buildings or similar structures owned or leased by the incumbent LEC that house LEC network facilities.” NPRM at ¶ 71.

<sup>9/</sup> WinStar’s typical installation has a highly discrete profile. A WinStar “tower” normally is no more than approximately four feet in height, to which several dishes, each of which is approximately the size of a medium pizza, is attached. No separate power source is needed on the roof. For the Commission’s reference, WinStar has attached as Exhibit A photographs and descriptions of a typical installation.

duct, conduit, or right-of-way owned or controlled by it.” In promulgating rules to implement this section, WinStar urges the Commission firmly to establish the right of new entrants to access rooftop rights-of-way and riser conduit controlled by incumbent LECs on the premises of third parties. Landlords are often reluctant to allow carriers other than the incumbent LEC to install facilities necessary to provide service to customers on their premises. Although the Commission has no power to order individual landlords to provide carriers with nondiscriminatory access to their premises, it can alleviate the problem by ordering incumbent LECs to provide nondiscriminatory access to rights-of-way and conduit that they control on and in buildings owned by others.

**B. The Commission Should Establish Non-Discriminatory, Technologically-Neutral, National Collocation Standards—Including a Standard Applicable to 38 GHz Carriers (NPRM, ¶¶ 66-73; 155-56)**

In response to the Commission’s inquiry whether there should be a national standard for collocation (NPRM at ¶ 68), WinStar submits that the Commission cannot tolerate material variation from the national standard that Congress created through § 251(c)(6) of the Act. As noted immediately above, Congress contemplated a technology-neutral interconnection regime. This mandate is further evidenced by the Act’s creation of “[t]he duty to provide, on rates, terms, and conditions that are just, reasonable, and *nondiscriminatory*, for physical collocation of equipment necessary for interconnection . . . .” 1996 Act, § 251(c)(6) (emphasis supplied). The Commission, therefore, must heed the wishes of Congress and allow the market to determine which technologies are most cost-effective and efficient.

In significant contrast to § 202(a) of the Communications Act of 1934 (which prohibits “*unreasonable* discrimination”). § 251(c)(6) imposes a significantly higher standard: LECs must provide rates, terms, and conditions that do not discriminate among CLECs. As such, § 251 (Interconnection) and § 252 (Procedures for Negotiation, Arbitration and Approval of Agreements) of the Act cannot be interpreted to prohibit only unjust and unreasonable discrimination. (See NPRM at ¶ 156.) Under § 251(c)(6) there is no such thing as “reasonable” discrimination. Use of the phrase “nondiscriminatory” without qualification makes this clear.

Also, the Act itself preempts inconsistent state regulations. Section 261 (b) of the Act states:

Nothing in this part shall be construed to prohibit any State commission from enforcing regulations prescribed prior to the date of enactment of the Telecommunications Act of 1996, or from prescribing regulations after such date of enactment, in fulfilling the requirements of this part, if such regulations are *not inconsistent* with the provisions of this part.

(Emphasis supplied.) In the face of such clearly articulated Congressional intent, the Commission cannot sanction material variation by the states.

WinStar agrees with the Commission’s tentative conclusion that it should adopt minimum national standards appropriate to implement the collocation requirements of the Act. (NPRM at ¶ 67.) In response to the Commission’s inquiry as to what equipment properly may be collocated on a LEC’s premises,<sup>10/</sup> WinStar submits that the rules should at a minimum authorize the

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<sup>10/</sup> “We seek comment on what types of equipment competitors should be permitted to collocate on LEC premises.” NPRM at ¶ 72.

installation of any equipment that a CLEC requires to physically interconnect its network with the LEC network.

Accordingly, the Commission should adopt a national standard that explicitly permits CLECs utilizing Commission-authorized 38 GHz spectrum to install necessary microwave transmission equipment (where space is reasonably available) on the roofs or appurtenances of LEC “premises” and to place necessary electronic equipment within such premises. For this standard to be meaningful, the Commission must further require that all LECs permit microwave collocators access to riser conduit necessary to interconnect roof-mounted microwave transmission equipment to LEC switching facilities. WinStar’s experience in attempting to negotiate interconnection arrangements underscores the need for national standards. At least one LEC has denied WinStar the right to access tandem roofs on the grounds that company policy precludes installation of radio antennas on rooftops.

Notwithstanding the considerable resources the Commission has devoted to collocation since its groundbreaking *Expanded Interconnection* order in 1992 (see NPRM at ¶¶ 72-73), 38 GHz service did not exist at that time and, therefore, WinStar’s innovative, vigorous, and extensive use of the 38 GHz frequency was not contemplated. In fact, microwave collocation was relatively rare, and most states (such as New York) considered microwave collocation on a case-by-case basis rather than developing uniform standards that could be relied upon by microwave competitors. This dampened enthusiasm for, and use of, microwave transmission as a competitive alternative to wireline competitive access services. As a result, neither LECs nor federal or state regulators have significant experience with the collocation of microwave transmission equipment

for the provision of local services. For these reasons, it is imperative that the Commission affirmatively conclude in this proceeding that LECs must permit 38 GHz providers (such as WinStar) to locate microwave transmission equipment on LEC premises and to interconnect with the public switched telephone network in a technically and economically efficient manner.

Lastly, to achieve technological neutrality, the Commission's rules must do more than ensure that carriers like WinStar simply have an opportunity to install necessary equipment. The rules also must establish parameters for the collocation rates charged by incumbent LECs. The Act requires such rates to be "just, reasonable, and nondiscriminatory." 1996 Act, § 251(c)(6). There is no public policy basis for preferring wireline technology over wireless by levying arbitrary and excessive fees against local wireless carriers to install rooftop mountings.

In recent interconnection negotiations, at least one RBOC has indicated that it may only be willing to offer WinStar access to its rooftops on the same terms and conditions that it provides such access to cellular operators. Unlike a cellular operator, WinStar does not provide Commercial Mobile Radio Service ("CMRS"). As a wireless CLEC, Winstar is entitled to the same terms and conditions for physical collocation (or other form of interconnection) that the incumbent LEC offers to all other CLECs. In other words, the total rates applicable to WinStar's physical collocation (whereby it runs cable from the roof) must not exceed those charged a wireline provider (which runs cable from the basement). The Commission must clarify this in national standards, or else (as WinStar's experience suggests) LECs will attempt to use this issue to delay WinStar's entry into the market or extract unreasonable and plainly discriminatory charges for use of their essential facilities. Clearly, under the Act, incumbent LECs may not

charge fees for roof mountings that exceed the actual costs incurred, regardless of what arrangements may have been previously “negotiated” with CMRS providers. The Commission’s rules expressly must force incumbent LECs to price access for roof mountings consistent with the Act.

*Comments Continue on Next Page* 

**III. THE ACT REQUIRES INCUMBENT LECS TO FURNISH NEW ENTRANTS WITH NONDISCRIMINATORY TREATMENT IN SERVICE PROVISIONING AND SERVICE INTERVALS (NPRM, ¶¶ 60-63)**

WinStar's local competition subsidiaries will enter the market with no established goodwill and few relationships with customers. Incumbent LECs have tremendous goodwill and large customer bases, making them fierce competitors. Other CLECs that already have commenced operations, particularly in NYNEX's territory, have found their lack of established goodwill to be a major barrier in the marketplace. Developing goodwill and a customer base to compete effectively with incumbent LECs will be critically dependent on WinStar's ability to provide timely service to customers, including provisioning and repair. Satisfied customers will stay with WinStar, while customers frustrated by inordinate delays to install or repair service will return to their traditional carrier and be very unlikely to switch again. Any delays in provisioning or service intervals almost certainly will be attributed by the customer to the CLEC, regardless of whether any such problems or delays in fact are directly traceable to the practices of the interconnecting incumbent LEC. A new entrant, without any historic reservoir of customer goodwill, simply cannot tolerate the risk of customer discontent caused by poor provisioning and/or service intervals over which it may have little or no actual control. In short, customers willing to switch providers have been found by other new entrants to want results, not excuses.

Realizing that incumbent LECs as a practical matter effectively could exclude competitors from the market by simply delaying service provisioning and repairs for services and facilities required by CLECs, Congress required incumbent LECs to interconnect with new entrants "on rates, terms, and conditions that are just, reasonable, and *nondiscriminatory*." 1996 Act,

§ 251(c)(2)(D) (emphasis supplied). Congress also specified that the interconnection provided to new entrants be “at least equal in quality to that provided by the [incumbent] local exchange carrier to itself or to any subsidiary, affiliate or any other party to which the carrier provides interconnection.” 1996 Act, § 251(c)(2)(C). Given this statutory mandate, there is no question that an incumbent LEC must provision all services, and must provide repairs, to local competitors such as WinStar as quickly as it provides these services to itself or its customers, specifically its most preferred customers.

The only issue before the Commission is how to design rules that effectively secure nondiscriminatory interconnection service for CLECs. WinStar urges the Commission to require incumbent LECs:

- 1) to provision service for CLEC customers at a *specified, publicly disclosed* interval that does not exceed the service provisioning time they afford themselves, related companies and their most-favored customers;<sup>11/</sup> and
- 2) to perform repairs within *specified, publicly disclosed* intervals that do not exceed the response times they extend to themselves, related companies and their most-favored customers experiencing the particular service problem.

It is important that competitors and customers be aware of the standards to which they are entitled. Historically, the state public service commissions (“PSCs”) have worked with the monopoly incumbent LECs to establish reasonable service and provisioning intervals. Typically, LECs that have failed to meet certain specified service standards have been penalized by state PSCs. Recently this has been a particular problem in the northeast United States, as well as

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<sup>11/</sup> Where incumbent LECs provision service for interexchange carriers (“IXCs”) within a shorter interval than they provision service for their own end users, WinStar is entitled to the shorter provisioning interval under § 251(c)(2)(C).

throughout US West territory. At the same time, state PSCs have been particularly resistant to enforcing similar standards upon LECs for the services that they provide to CLECs. In state proceedings and before state regulators, LECs have argued that their primary obligation is to their end user customers (not CLECs) and that the public interest dictates that resources be directed first and primarily to end user customer issues. This argument has appealed to state PSCs and consumer advocates, providing CLECs little or no recourse against LECs that are either unable or unwilling to provide (or meet) reasonable provisioning standards.

By adopting § 251(c)(2)(C) of the Act, Congress foreclosed such arguments. LECs are obligated to provide CLECs service provisioning and repair intervals equal to those which LECs provide to themselves. This recognizes and confirms that CLECs are co-equal (or peer) providers of local telecommunications services to the public and that LECs have a public interest obligation to CLECs (and to CLEC customers) to provide reasonable and nondiscriminatory service and repair standards, just as historically they have had such obligations to neighboring independent telephone companies, for example, in jointly provisioning extended area service arrangements.

Because the issue of service standards has historically been in the hands of state PSCs, the Commission should require them to adopt detailed and explicit rules governing service and repair standards that apply to CLECs and that, *at a minimum*, are comparable to the incumbent LEC's own internal provisioning and service intervals. Further, the Commission should clarify that these standards must comply with § 251 of the Act. Also, LECs should be required to establish minimum service provisioning and repair intervals in any negotiated agreements, and any

CLEC should be entitled to the service and repair intervals available under a negotiated agreement with another carrier, including agreements with neighboring telephone companies.

To enforce these rules, CLECs shall be compensated for an incumbent LEC's failure to observe a minimum provisioning/repair interval through liquidated damages. Again, because of the state PSC's historical jurisdiction over these issues, the states should be given an opportunity to adopt rules on liquidated damages, and incumbent LECs should be required to incorporate liquidated damage clauses in negotiated agreements. If incumbent LECs fail to include liquidated damage clauses in negotiated agreements, state PSC liquidated damage rules automatically should apply as if incorporated within the agreement in the first instance. If the state PSC declines to adopt such rules, the Commission should interpose its own. For these purposes, the Commission should define a set of default liquidated damage provisions.

*Comments Continue on Next Page*

**IV. UNDER THE ACT THE COMMISSION'S INTERCONNECTION RULES SERVE AS BASELINE STANDARDS FOR THE NATION (NPRM, ¶¶ 50; 157)**

WinStar agrees with the Commission's tentative conclusion to create national standards for evaluating interconnection agreements. Congress intended for the Act's treatment of interconnection under § 251 to function as a national standard. Under § 252(e)(6), carriers dissatisfied with the results of the negotiation process may bring federal actions on the ground that a state commission's handling of an arbitration does not comply with § 251. Congress contemplated that the Commission's rules under § 251 would also act as a national standard, when it stated:

In prescribing and enforcing regulations to implement the requirements of this section, the Commission shall not preclude the enforcement of any regulation, order, or policy of a State commission that--

- (A) establishes access and interconnection obligations of local exchange carriers;
- (B) *is consistent* with the requirements of this section; and
- (C) *does not substantially prevent implementation* of the requirements of this section and the purposes of this part.

1996 Act, § 251(d)(3) (*emphasis added*). As this passage shows, Congress anticipated that the Commission would establish a national interconnection standard. Congress thus sought to protect state regulations that are "consistent" with, and do "not substantially prevent" implementation of, § 251. In the process, Congress highlighted the Commission's prerogative to preempt state regulations that are inconsistent with § 251 or otherwise substantially impede its implementation. WinStar submits that Congress has instructed the Commission to preempt state regulations that

either serve as barriers to entry in practice or that are less favorable to CLECs than rules that will be adopted by the Commission in this proceeding.<sup>12/</sup>

*Comments Continue on Next Page* 

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<sup>12/</sup> Delay in preempting inconsistent state regulation undermines the public interest and the clear mandate of the Act to increase competitive alternatives for local services.

**V. THE ACT REQUIRES THE TERMS OF NEGOTIATED OR ARBITRATED AGREEMENTS TO BE AVAILABLE TO ALL REQUESTING CARRIERS (NPRM, ¶¶ 269-72)**

Under the Act, WinStar believes that it should be able to access the rates and terms of negotiated or arbitrated agreements in their entirety or each element thereof individually.

Section 252(i) of 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.

The meaning of this subsection is clear. In using the words “*any* interconnection, service, or network element,” Congress intended CLECs to be able to access relevant portions of agreements without having to accept every term of an agreement. (Emphasis supplied.) In fact, to the extent that WinStar’s wireless technology requires collocation through rooftop access, as previously discussed, any suggestion that the Act only requires a LEC to make a previously negotiated agreement available in its entirety to subsequent requesting carriers effectively would preclude a wireless CLEC, such as WinStar, from obtaining the benefits of an interconnection agreement between a LEC and another wireline CLEC. This clearly was not the intent of Congress, which sought to expand, not constrict, competitive local exchange options.

Congress understood that it would be more difficult for incumbent LECs to discriminate against individual CLECs if the terms of agreements, either collectively or singly, were open to all requesting carriers. In this respect WinStar agrees with the Commission (NPRM at ¶ 269) that § 252(i) is one of the Act’s primary tools to prevent 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 by the LECs against new entrants.

Certain LECs have argued that § 252(i) only allows a CLEC to purchase network elements or services at the rates and terms of a negotiated agreement if the CLEC is willing to accept every term of the agreement in question. The LECs hope to delay CLEC entry in the market by forcing each and every CLEC to spend precious time and money negotiating, and perhaps arbitrating, their own unique agreements. To prevent incumbent LECs from undermining § 252(i)—and from creating opportunities to discriminate against CLECs—the Commission must clarify that this subsection automatically affords CLECs access to any principal portion of an agreement.

The Commission has asked interested parties to comment on what the Senate Committee on Commerce, Science, and Transportation meant when it stated that § 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.”<sup>13/</sup> WinStar submits that the Committee’s use of the words “individual elements” buttresses the conclusion that negotiated agreements are generally to be made available to other carriers on an item-by-item basis.

WinStar agrees with the Commission that, on its face, the text of § 252(i) allows *any* requesting carrier to access components of an agreement. (NPRM at ¶ 270.) Congress did not limit § 252(i) to similarly situated carriers. WinStar doubts whether states could implement a similarly-situated-carrier requirement without unintentionally creating a vehicle for LECs to

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<sup>13/</sup> Senate Comm. on Commerce, Science and Transportation, Report on S. 652, at 21-22 (March 23, 1995).