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Before the

FEDERAL COMMUNICATIONS COMMISSION

Washington, D.C. 20554

In the Matter of	)	
	)	
Implementation of the Local Competition Provisions in the Telecommunications Act of 1996	)	CC Docket No 96-98
	)	
Interconnection between Local Exchange Carriers and Commercial Mobile Radio Service Providers	)	CC Docket No. 95-185

WINSTAR COMMUNICATIONS, INC.
OPPOSITION TO PETITIONS FOR RECONSIDERATION

Timothy R. Graham
Robert G. Berger
Joseph Sandri
WinStar Communications, Inc.
1146 19th Street, N.W.
Washington, D.C. 20036

Counsel for WinStar Communications, Inc.

Dated: October 31, 1996

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SUMMARY OF ARGUMENT

Parties in this proceeding have argued (i) that rooftops and related riser conduit are not "rights of way" which competitive local exchange carriers such as WinStar are entitled to access under Section 224, and (ii) that incumbent LECs and utilities are not obligated under the Telecommunications Act of 1996 to provide access to rights of way to carriers who happen to employ wireless transmission facilities.

Both positions are wrong, and are contrary to the letter and spirit of the Telecommunications Act. If adopted, these positions would egregiously discriminate against carriers seeking to provide competitive local exchange service through innovative wireless technologies in violation of the Act and the Commission's interconnection rules. These arguments demonstrate more ably than WinStar ever could, the degree to which incumbent LECs and utilities will seek to avoid their obligation under the Telecommunications Act to make rights of way available to new wireless local exchange carriers such as WinStar. To rectify such obstructions, the Commission should clearly instruct parties that wireless carriers such as WinStar are entitled to access rooftops and related riser conduit in order to place attachments necessary to further their local exchange distribution networks

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WinStar Communications, Inc. ("WinStar"), a provider of competitive dedicated and switched local exchange services, by its undersigned counsel and pursuant to Section 1.429(f) of the Commission's Rules, 47 CFR § 1.429(f), hereby files this opposition to certain petitions seeking reconsideration of aspects of the Commission's *First Report and Order* in the above-captioned dockets, FCC 96-325, released August 8, 1996 (the "*Order*").[1]

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[1] WinStar 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℠ because of its ability to duplicate the technical characteristics of fiber optic cable with wireless 38 GHz microwave transmissions. WinStar's typical installation of 38 GHz equipment has a highly discrete profile. A WinStar "installation" 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, can be attached. No separate power source is needed. This installation is considerably more compact and less intrusive than the typical microwave facilities employed by incumbent LECs and other utilities as part of their network architectures.

I. Introduction and Summary

On September 30, 1996, WinStar filed in these proceedings a petition seeking clarification or reconsideration of a single aspect of the Commission's *Order* ("WinStar Reconsideration Petition"). Specifically, WinStar requested that the Commission make clear WinStar's right, where it operates as a facilities-based local exchange carrier, to locate its 38 GHz microwave equipment on the roof of incumbent LEC and utility premises and to utilize related riser conduit owned or controlled by the incumbent LEC or utility in order to provide competitive local exchange service. This is necessary because, unlike fiber-optic carriers who string fiber in underground conduits and ducts or on pole attachments, a carrier such as WinStar, which employs innovative wireless technology, necessarily needs to place microwave transmission facilities on roofs and utilize related rights of way, owned or controlled by the LEC or utility, both for purposes of collocation and for establishment of its distribution network. Accordingly, access to roofs and related riser is necessary to accomplish interconnection, to further its distribution network and, in some instances, to reach end user customers.

In short, for a wireless local exchange carrier such as WinStar, roofs and related riser conduit are, by definition, the critical right of way. Traditional rights of way relied upon by fiber-based carriers (such as underground conduits) are meaningless to WinStar because the very advantage of the advanced wireless technology employed by WinStar is that it avoids such constraints. This is exceedingly important as carriers seek to secure

more advanced methods of meeting customer need.[2] It is not enough to say simply (as parties discussed below do) that the rights of way traditionally employed in the pre-Telecommunications Act era are sufficient in the post-Act era.

In its Reconsideration Petition, WinStar agreed with the Commission that "there are too many variables to permit" anything other than a case-by-case approach to resolving rights of way disputes. *See Order* at para. 1143. However, it has been WinStar's experience that, without the benefit of additional clarification by the Commission indicating that access to roofs and riser is mandated absent threshold capacity, safety, reliability, or engineering concerns,[3] there will be no basis for case-specific adjudications.

In response to this straightforward request, several parties have argued: (i) that roof and riser conduit are not "rights of way" (regardless of the use to which they are put by the controlling utility); and (ii) that incumbent LECs and utilities are not obligated under the Telecommunications Act of 1996 (the "Telecommunications Act" or "Act") to provide access to rights of way to carriers who happen to employ wireless transmission facilities. Not only

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[2] Even incumbent local exchange carriers are looking to wireless local exchange carriers such as WinStar to assist in meeting customer demand. For example, Pacific Bell has recently purchased considerable wireless local loop transmission capacity from WinStar in order to meet the need for its local exchange service. *See* Gautam Naik, *PacTel to Buy Wireless Links From WinStar, Wall Street Journal*, Oct. 28, 1996, at B4 ("wireless links will help [PacTel] reach customers in areas of California where it was previously barred from offering local phone service.... [Pacific Bell] is also counting on the extra capacity to meet surging demand for Internet connections that its current traditional phone network can't meet").

[3] The Commission has concluded that the question of access should be decided based upon these factors, at least with regard to utilities. *See Order* at para. 1186.

are both positions contrary to the Congress' fundamental intention to "provide for a pro-competitive, de-regulatory national policy of framework designed to accelerate rapidly private sector deployment of advanced telecommunications and information technologies and services to all Americans . . . ."[4] but, if adopted, they would unreasonably discriminate in favor of carriers that employ fiber-optic transmission facilities in clear contravention of the Act.[5]

For the reasons discussed below, the Commission must reject these arguments and clearly enunciate to incumbent LECs and utilities that they are obliged to provide non-discriminatory access to all rights of way (including, where appropriate, roofs and riser conduit that they own or control) to carriers such as WinStar that employ wireless transmission facilities. The pleadings filed recently in this proceeding demonstrate more ably than WinStar ever could that, absent such clear instruction from the Commission, parties will seek to avoid their obligation under the Act to make rights of way available to new wireless local exchange competitors such as WinStar.

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[4] H. R. Rep No. 104-458 at 113 (1996).

[5] Indeed, many of the commenting parties have built and employed their own fiber loops. Additionally, LECs and utilities routinely utilize their rooftops and riser conduit facilities to operate sophisticated mobile and fixed wireless networks. Often, those wireless networks interconnect with fiber optic facilities.

II. The Commission Should Provide Clear Guidance That Wireless Local Exchange Carriers Are Entitled to Access Roofs and Related Riser Conduit Owned or Controlled by Utilities, Including Incumbent LECs

In its September 30, 1996 Petition for Reconsideration or Clarification ("Duquesne Petition"), Duquesne Light Company correctly notes that telecommunications carriers are seeking to employ "increasingly sophisticated and innovative attachments," examples of which are "fiber optic cable wrapped around existing coaxial strand, in-line amplifiers and other equipment installed mid-span between distribution poles, wireless antennae, microwave dishes, and so forth." Duquesne Petition at 17. Duquesne does not oppose these attachments and, at least insofar as pole attachments (upon which WinStar does not rely) are concerned, Duquesne appears confident that technical and reliability issues can be resolved.[6] Yet, less than a month later, Duquesne filed a pleading in which it incredibly concludes just the opposite -- that the potential placement of an "innovative" microwave

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[6] To the extent such attachments constitute a "problem," Duquesne concluded that:

> [t]his problem can be alleviated by the Commission clarifying that the number of pole attachments a given entity makes is not necessarily determined by the number of attachments made to the pole, but by determining the equivalent burden (in terms of a single wire attachment) supported by the pole. Alternatively, the Commission could defer this issue to the forthcoming Notice of Proposed Rulemaking on pole attachment rates, by indexing the presumptive space taken on the pole (currently deemed to be one foot) by a factor calculated with respect to weight and wind loads.

Duquesne Petition at 18

antennae or microwave dish on a utility's rooftops would, without regard to the relevant safety, capacity, and reliability factors, violate the Telecommunications Act.[2]

Specifically, Duquesne indicates (wrongly) that the Commission has concluded that the terms "pole, duct, conduit or right of way" in Section 224(f)(1) do not, in any instance, include the roofs of utility buildings. Duquesne Opposition at 3. Duquesne also argues that, in any case, the "rooftop" of a utility building is "most definitely" not a right of way to which wireless carriers such as WinStar are entitled to access. *Id.* at 5.

Duquesne is wrong on both counts. First, WinStar is unaware of any legal support for the proposition that roofs are not rights of way (beyond the dicta quoted below which is the subject of WinStar's Reconsideration Petition), and Duquesne's Petition fails to provide any support other than to quote the legal conclusion of another utility's comments in this proceeding. As WinStar noted in its Reconsideration Petition, access to roofs and related riser is, <u>by definition</u>, access to <u>the</u> critical right of way for local exchange carriers such as WinStar that employ 38 GHz or other wireless technology to provide local exchange services.

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[2] Opposition to WinStar Communications, Inc. Petition for Clarification or Reconsideration, Ducuesne Light Company, CC Docket 96-98 (October 23, 1996) ("Duquesne Opposition"). To paraphrase Gertrude Stein, under the Telecommunications Act, a right of way is a right of way is a right of way (regardless of whether it is currently being used), and telecommunications carriers are entitled to utilize rights of way for the purposes of developing a competitive local exchange network. Roofs and utility poles are both rights of way, and Duquesne fails to explain why problems associated with wireless attachments on utility poles (relatively insubstantial structures) can be "alleviated," but that problems associated with wireless attachments on roofs (relatively substantial structures) cannot.

Whether utility roofs are rights of way within the meaning of the Telecommunications Act is simple to demonstrate. Both incumbent LECs and utilities maintain extensive microwave and wireline networks which are now being used for telecommunications purposes.[14] They are free to site these microwave facilities upon their roofs. In this instance, the roof is clearly a right of way and a part of the incumbent LEC's or utility's "distribution network." However, even where the LEC or utility does not utilize the roof (perhaps because it employs fiber), the roof is no less a right of way. This is analogous to a situation where a LEC or utility owns or controls conduit, but, for practical reasons, is not utilizing that conduit at the moment. This does not make the conduit any less a right of way. Thus, roofs owned or controlled by a LEC or utility may or may not be used at a given moment; however, whether or not a LEC or utility currently uses the roof as part of its distribution network is immaterial because it is a potential part of its distribution network. Moreover, even the most established incumbent LECs are rethinking and revising their methods of provisioning local exchange service, as PacBell's purchase of WinStar's wireless loops attests. As a result of the Telecommunications Act, carriers are in a constant state of evolution and are rethinking their own utilization of technology. Adoption of Duquesne's presumption – that roofs and related conduit are not rights of way – would

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[14] As the Commission recognized in its *Order*, "[w]e note in particular that a utility that itself is engaged in video programming or telecommunications services has the ability and incentive to use its control over distribution facilities to its own competitive advantage." *Order* at 1150.

unreasonably restrict similar evolution by competitive local exchange carriers such as WinStar in violation of the Telecommunications Act.[9]

Further, Section 224 very clearly does not make prior use of a right of way (either by the utility or by a third party) a condition on whether or not a new entrant such as WinStar may utilize the right of way.[10] That would void the intent of Section 224 – to open up rights of way to creative new uses and development. Moreover, it would be contrary to the Commission's conclusion that Section 224 obligates a utility to exercise its eminent domain authority to expand an existing right of way over private property in order to accommodate a request for access. *See Order* at para. 1181. Of course, as WinStar noted above, it recognizes that there may be discrete instances where, for safety, reliability, or other reasons, it would be inappropriate to site an attachment on a utility or other roof; however, that would be the exception, not the rule, and the party opposing use

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[9] It is relevant to note that Section 704 of the Telecommunications Act and the FCC (through "FCC Wireless Facilities Siting Policies: Fact Sheet #23," released September 17, 1996) clearly recognizes the importance of all property (including, as a subset, rooftops) in the provision of wireless services: "Section 704 of the 1996 mandates that the federal government make available property, rights-of-way, and easements under its control for the placement of new spectrum-based telecommunications services."

[10] Duquesne's Petition illustrates a presumption that wireless carriers are not entitled to access a right of way unless and until they prove that the access they seek is the same or similar to that previously sought by fiber-based carriers. As WinStar noted in its Reconsideration Petition (at 8, n 5), whether any specific utility or incumbent LEC has chosen to utilize microwave transmission media is irrelevant to the question of whether WinStar is entitled, under the Telecommunications Act, to access roofs and riser conduit. Accordingly, the Commission should clarify that WinStar's right to access such rights of way is not, in any sense, dependent upon whether fiber-optic based carriers have previously sought to utilize the same or similar rights of way.

of the right of way must bear the burden of demonstrating why use of the right of way is inappropriate. *See Order* at para. 1150.

Second, Duquesne is wrong that the Commission has concluded that telecommunications carriers are not entitled to access to utility roofs. As WinStar recognized in its Reconsideration Petition (at 5), the Commission concluded that Section 224(f) (1) *likely* does not mandate

> that utility make space available on the roof of its corporate offices for 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.

Order at para. 1184 (footnotes omitted). This dicta was the subject of WinStar's request for reconsideration

As WinStar explains in this filing, it is not seeking "access to every piece of equipment or real property owned or controlled by the utility." Simply put, it is seeking access to legitimate rights of way that will be effective in enabling wireless local exchange carriers to expand their local exchange distribution networks. This is no more nor less than the Act requires. Grant of Duquesne's Petition would exempt incumbent LECs and utilities from having to provide access to roofs and riser without reference to: (i) whether the roof is a right of way under Section 224; (ii) relevant safety, reliability, or capacity factors; (iii) whether the roof is being used by the incumbent LEC or utility for telecommunications

services; (iv) whether the incumbent LEC or utility has previously provided access to the roof to another carrier, or (v) whether the roof could reasonably be interpreted to be "piggybacking" along a distribution network owned or controlled by the incumbent LEC or utility. Thus, the exemption would be unprincipled, would be contrary to the Telecommunications Act, and would discriminate against wireless carriers such as WinStar in favor of traditional fiber-based carriers that traditionally utilize conduit and pole attachments to develop local exchange distribution networks.[11] In short, in violation of the Act, grant of Duquesne's Petition would enable utilities to use their "control of the enumerated facilities and property to impede, inadvertently or otherwise, the installation and maintenance of telecommunications and cable equipment by those seeking to compete in those fields." *Order* at para. 1123.

III. The Commission Must Reject Arguments That Would Limit the Definition of Reasonable Attachments

Several parties have mounted headlong attacks on the ability of wireless carriers to attach wireless facilities. The Commission should reject these spurious claims out of hand. In its *Order*, the Commission correctly recognized that the Telecommunications Act does not describe the "specific types of telecommunications or cable equipment that may

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[11] *See also Order* at para. 1170 (prohibiting an incumbent LEC from reserving space or control of a right of way for its own future provision of local exchange service to the detriment of a would-be entrant and would favor the future needs of the incumbent over the needs of a new entrant, in violation of Section 224(f)(1) which "prohibits such discrimination"). WinStar recognizes that this specific prohibition does not apply where an electric utility is reserving space solely for electric service (*see id.*).

be attached when access to utility facilities is mandated," and concluded that the question of access will be dependent upon a number of issues, including size and weight of attaching equipment and such factors as "capacity, safety, reliability and engineering principles." *See Order* at para. 1186.

Consolidated argues (without support of any kind) that "the Commission misunderstands the intent of the law," and that the only equipment permitted to be attached to utility facilities are cables." Consolidated Petition at 12. Similarly, Florida Power and Light ("FP&L") erroneously concludes that "utility poles, ducts, conduits or rights of way are unsuited for placement of wireless equipment,"[12] and further argues that the Commission should find that utilities are not obligated to provide access to poles, ducts, conduits or rights of way to carriers that employ wireless transmission equipment, because wireless equipment "has not been considered a 'pole attachment'" and because Section 224(a) defines "utility" to exclude carriers that utilize wireless equipment.[13]

These carriers are simply wrong on the law (neither is able to cite any support for the position that utilities should be able to discriminate against wireless carriers by refusing attachments), and their comments misapprehend the basic goals and intentions of the

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[12] Florida Power & Light, Petition for Reconsideration and/or Clarification of the First Report and Order, CC Docket 96-98 (September 30, 1998) at 24-25. The FP&L conclusion is extremely surprising considering the utility industry's heavy usage of poles, ducts, conduits, and rights of way for their own wireless equipment and operations.

[13] The Commission should note that FP&L's argument is in apparent conflict with Duquesne's position that problems associated with wireless attachments can be resolved. See footnote 6, *supra*.

Telecommunications Act. As it stated in its Reconsideration Petition (at 6), WinStar does not challenge the Commission's conclusion that the reasonableness of conditions limiting access to rights of way should be considered on a case-by-case basis. However, Section 224(f)(1) is entirely clear: utilities must grant access to any pole duct, conduit, or right of way that is "owned or controlled by it." There is no basis in law or policy for excluding carriers simply because they employ wireless transmission equipment. This has been WinStar's point all along: as Consolidated's and FP&L's comments demonstrate, there is an acute need for the Commission to provide additional instruction to incumbent LECs and utilities that WinStar and other similarly situated wireless local exchange carriers are entitled to access all rights of way, including roofs and related riser cable, absent (in the utilities' case) adequate demonstration of safety, reliability, or capacity limitations.[14]

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[14] FP&L makes several curious legal claims. For example, it asserts (correctly) that, in Section 224(a)(1), Congress defined "utility" as "any person who is a local exchange carrier or an electric, gas, water steam, or other public utility, and who owns or controls poles, ducts, conduits or other rights of way used, in whole or in part, for any *wire communications* . . . ," and then claims that carriers that employ wireless transmission facilities are not "utilities" entitled to access rights of way.

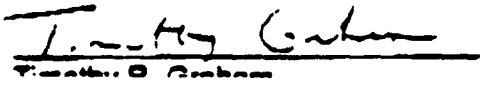
This is a nonsensical claim. Section 224(a)(1) defines who must provide access to rights of way, not who can claim access to rights of way. Section 224(f)(1) provides that any "utility" must provide access to rights of way to any "telecommunications carrier." "Telecommunications carrier" is defined broadly in Section 3(44) to include "any provider of telecommunications services, except that such term does not include aggregators of telecommunications service." Wireless carriers are thus clearly "telecommunications carriers" entitled to access rights of way. Even if they were not, 38 GHz carriers such as WinStar employ a combination of wireless and wireline transmission facilities in order to provide service to end user local exchange customers, and the end device is attached via wireline.

Obviously, without such further guidance, incumbent carriers and utilities will employ a variety of arguments, some sophisticated, some not so sophisticated, in order to deny WinStar and other similarly situated carriers the access that is mandated by the Telecommunications Act.

CONCLUSION

For the foregoing reasons, the Commission should clarify that incumbent LECs and utilities must provide wireless competitive local exchange carriers, such as WinStar, cost-based access to roofs and related riser conduit for the purpose of developing their local transmission and distribution facilities.

Respectfully submitted,



Timothy B. Graham

CERTIFICATE OF SERVICE

I hereby certify that on this 31st day of October 1996 copies of WinStar Communications, Inc.'s Opposition To Petitions For Reconsideration were served on the attached list by first class mail, postage prepaid.

Katherine Swall

Katherine Swall

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Timothy R. Graham
Robert G. Berger
Joseph Sandri
WinStar Communications, Inc.
1146 19th Street, N.W.
Washington, D.C. 20036

Dana Frix
Antony R. Petrilla
Swidler & Berlin, Chtd.
3000 K Street, N.W., Suite 3000
Washington, D.C. 20007
(202) 424-7500

Counsel for
WinStar Communications, Inc.

Dated: September 30, 1996

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WinStar Communications, Inc. ("Winstar"), a provider of competitive dedicated and switched local services, by its undersigned counsel, hereby petitions the Commission for clarification or reconsideration of a single aspect of the *First Report and Order* in the above-captioned dockets, FCC 96-325, released August 8, 1996 (the "*Order*").[1]

I. INTRODUCTION AND SUMMARY

While the Telecommunications Act of 1996 ("1996 Act") established the initial framework for competition in local exchange markets around the country, the Commission's *Order* successfully translated the broad outline of the 1996 Act into more specific —

[1] WinStar 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℠ because of its ability to duplicate the technical characteristics of fiber optic cable with wireless 38 GHz microwave transmissions. WinStar's typical installation of 38 GHz equipment has a highly discrete profile. A WinStar "installation" 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, can be attached. No separate power source is needed. This installation is considerably more compact and less intrusive than the typical microwave facilities employed by incumbent LECs as part of their network architecture.

and consequently more worthwhile — rules and regulations. True to its guiding principles, the Commission promulgated rules that are appropriately pro-competition, rather than pro-competitor, and has facilitated the resolution of interconnection negotiations between many new entrants and incumbent local exchange carriers ("LECs").

This Petition requests that the Commission clarify WinStar's right, where it operates as a facilities-based competitive local carrier, to locate its 38 GHz microwave equipment on the roof of utility premises and to utilize related riser conduit owned or controlled by the utility, in order to provide competitive local services to end user customers, as well as for purposes of interconnection. Although WinStar believes that the framework for competition outlined in its *Order* clearly provides that incumbent LECs cannot discriminate against a carrier because of the nature of its distribution technology (in WinStar's case, 38 GHz microwave transmission), incumbent LECs have been reluctant to enter into binding arrangements that would enable WinStar to utilize, at cost-based rates, rooftops and related riser conduit owned or controlled by the incumbent LEC absent clear instruction from the Commission. As demonstrated below, WinStar believes that minor clarification by the Commission would eliminate this very significant barrier to competition and would expedite and simplify interconnection negotiations, thus speeding competition for local services to end user customers.

II. THE COMMISSION SHOULD CLARIFY THAT WIRELESS CARRIERS ARE ENTITLED TO ACCESS ROOFS AND RELATED RISER CONDUIT OWNED OR CONTROLLED BY UTILITIES, INCLUDING INCUMBENT LECS

In its comments in this proceeding, WinStar noted that, in contrast to fiber based carriers, WinStar will utilize technologically unique, state-of-the art 38 GHz transmission equipment as a central component of its transmission and distribution network. Further, as a fixed-point-to-point wireless carrier, WinStar noted that it will need to place its microwave transmission facilities on roofs and utilize related rights of way (most importantly, riser conduit) owned or controlled by utilities, including incumbent LECs.[2] In practice, the rights of way utilized by WinStar's fiber based competitors chiefly include pole attachments as well as underground conduit and ducts, through which fiber optic cable is strung. In contrast, local exchange carriers such as WinStar that rely upon wireless microwave facilities have virtually no use for pole attachments or underground conduits or ducts, precisely because their transmission facility avoids the need for these conventional right of way obstacles.

In its *Order* the Commission interpreted in substantial detail the broad nondiscriminatory access requirements of Section 224(f)(1) which provides that a utility must grant telecommunications carriers such as WinStar access to all rights of way owned or controlled by the utility. *Order* at ¶¶ 1119-1187. Analyzing this provision, the Commission correctly recognized the broad mandate of Section 224(f) when it stated that: "[t]his directive seeks to ensure that no party can use its control of the enumerated facilities and

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[2] See WinStar May 20, 1996 Comments in this proceeding (at 2-6).

property to impede, inadvertently or otherwise, the installation and maintenance of telecommunications and cable equipment by those seeking to compete in those fields." *Order* at ¶ 1123. The Commission further concluded that it believes "it unlikely that Congress intended to allow an incumbent LEC to favor itself over its competitors with respect to attachments to the incumbent LEC's facilities. . . ." *Order* at ¶ 1157. The import of the Commission's holdings thus appears simple: competitors have the same right as utilities (such as the incumbent LEC) to place attachments on rights of way or facilities that the utility owns or controls. This is a particularly broad mandate (as Congress intended). Unfortunately, in its *Order* the Commission failed to provide sufficient guidance on the one rights of way issue central to WinStar's efforts to offer competitive local services — namely, access by wireless local exchange carriers to utility roofs and related riser conduit.

In its discussion of Section 224(f) and rights of way the Commission concluded that "the reasonableness of particular conditions of access imposed by a utility should be resolved on a case-specific basis." *Order* at ¶ 1143. As the Commission appropriately recognized, "there are simply too many variables to permit any other approach" other than a case-by-case basis. Similarly, the Commission was correct that the broader access to rights of way mandated by Section 224(f) will likely increase the number of disputes and "may cause small incumbent LECs and small entities to incur the need for additional resources to evaluate, process and resolve such disputes. . . ." *Id.* As a result, the Commission correctly concluded that it should not "enumerate a comprehensive regime

of specific rules, but instead establish a few rules supplemented by certain guidelines and presumptions. *Id.*

In the section of the *Order* particularly relevant to WinStar, the Commission noted that commenters were divided over whether a broad or narrow interpretation of "rights of way" should apply. In doing so, it noted that an overly broad interpretation could negatively affect building owners and managers, as well as small incumbent LECs, "by requiring additional resources to effectively control and monitor such rights-of-way located on their properties." *Order* at ¶ 1185. Rather than addressing the specific right of way issues raised by WinStar (roofs and riser conduit) the Commission concluded only that Section 224(f)(1) likely does not mandate

> that a utility make 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.

Order at para. 1185 (footnotes omitted) (emphasis supplied).

As noted above, WinStar believes that the Commission was correct to establish guidelines rather than comprehensive rules, however, in doing so the Commission failed to clearly establish the one guideline that would address the particularized concern of absolutely critical importance to WinStar and which is clearly mandated by Section 224(f). As a result, in contradistinction to the clear mandate of Section 224(f), incumbent LECs

repeatedly have sought to refuse WinStar access to roofs and riser conduit under their control, particularly at cost-based rates.

For this reason WinStar requests that the Commission clarify that utilities, including incumbent LECs, provide WinStar access to roof tops and related riser conduit under their control, at cost-based rates, in order for WinStar to install its 38 GHz radio equipment in furtherance of its transmission and distribution network. WinStar does not challenge the Commission's conclusion that the reasonableness of conditions limiting such access should be considered on a case-specific basis. However, there will be no basis for such case-specific adjudications if it is not clear as a general guideline that such access is mandated.[x]

As noted above, the Commission has firmly established fiber-based competitors' right to rights of way such as pole attachments and underground duct and conduit owned or controlled by a utility. Therefore, it would be unreasonable to discriminate against alternative technologies, such as WinStar's 38 GHz distribution networks, by not clarifying WinStar's right to roofs and related riser conduits — the true bottlenecks which impede wireless carriers' entry into local markets. Moreover, it is contrary to the explicit provisions

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[x] The Commission has correctly recognized that the scope of a utility's ownership or control of an easement of right of way is a matter of state law and that the Commission "cannot structure general access requirements where the resolution of conflicting claims as to a utility's control or ownership depends upon variables that cannot now be confirmed." *Order* at ¶ 1179. By this petition WinStar is seeking only that the Commission firmly establish the general principle that WinStar is entitled to all rights of way owned or controlled by a utility, and that this includes roofs and related riser conduit useful and necessary for placement of its 38 GHz equipment.

of Section 224(f)(1) which mandates carriers' access to "any pole, duct, conduit or right-of-way." For a wireless local exchange carrier such as WinStar, access to roofs and risers by definition is access to the critical rights-of-way.

As the Commission has recognized, Section 224(f) mandates access "every time a telecommunications carrier ... seeks access to the utility facilities or property... with the limited exception allowing electric utilities to deny access" for insufficient capacity or for safety and reliability reasons. *Order* at ¶ 1123. Moreover it is contrary to the Commission's own broad interpretation of Section 224(f). For example, the Commission has concluded that Section 224(f) not only mandates access to a utility's existing rights of way, but that it requires utilities to exercise their powers of eminent domain to "expand an existing right of way over private property in order to accommodate a request for access, just as it would be required to modify its poles or conduits to permit attachments." *Order* at ¶ 1181. Clearly, given the Commission's emphasis on promoting alternative technologies to serve local customers, it could not intentionally have interpreted broadly rights of way that serve wireline carriers and narrowly interpreted rights of way that serve alternative wireless local exchange carriers. The only reasonable interpretation is that the Commission failed to clearly enunciate the general principle that wireless carriers such as WinStar are entitled

to roofs and related riser conduit on the same basis that wireline carriers are entitled to poles, ducts and conduit.[4]

Moreover, at least certain of the incumbent LECs (such as US West) have stated in WinStar state certification proceedings that they rely upon microwave transmission facilities as an integral part of their transmission and distribution network. Thus, failure by the Commission to establish the principle that WinStar is entitled to roofs and related riser conduit would enable incumbent LECs to favor themselves over competitors in a blatantly discriminatory fashion that must not be sanctioned by the Commission.[5] The fundamental issue is to ensure that wireless carriers such as WinStar are able to piggyback upon the rights of way owned or controlled by the incumbent LECs in the manner clearly intended by Congress when it adopted Section 224(f). Failure by the Commission to clarify this general principle would result in the unintended effect that wireline carriers would have

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[4] It is immaterial to WinStar whether such access is considered a right of way or access to an unbundled element, provided that such access is available at forward looking, cost-based, nondiscriminatory rates, and specifically at rates no higher than the Total Element Long Run Incremental Cost ("TELRIC") rates the Commission has established for interconnection and unbundled network elements.

[5] Whether any specific utility or incumbent LEC has chosen to utilize microwave transmission media is irrelevant to the question of whether WinStar is entitled to access roofs and related riser conduit. As the Commission has recognize, the import of Section 224(f) is to ensure that "no party can use its control over the enumerated facilities and property to impede... the installation and telecommunications ... equipment by those seeking to compete...." Order at ¶ 123. Thus even where an incumbent LEC has chosen, as a matter of architecture and engineering, not to employ microwave radio equipment, it must allow competitors who choose to use such equipment access to the necessary rights of way.

virtually unfettered access to the rights of way necessary to develop their networks, while wireless local exchange carriers such as WinStar would be deprived of similar access

CONCLUSION

For the foregoing reasons, WinStar requests that the Commission clarify that utilities must provide wireless competitive local carriers, such as WinStar, cost-based access to roofs and related riser conduit for the purpose of developing their local transmission and distribution facilities.

Respectfully submitted,

Dana Frix

Dana Frix
Antony R. Petrilla
Swidler & Berlin, Chtd.
3000 K Street, N.W., Suite 300
Washington, D.C. 20007
(202) 424-7662 (Tel)
(202) 424-7645 (Fax)

Timothy R Graham
Robert G Berger
Joseph Sandri
WinStar Communications, Inc.
1146 19th Street, N.W.
Washington, D.C. 20036

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CERTIFICATE OF SERVICE

I hereby certify that, on the 1st day of October, 1996, a copy of the Petition for Clarification or Reconsideration of WinStar Communications, Inc., was served on the following individuals either by hand-delivery or first-class postage prepaid mail.

Katherine A. Swall

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