

**BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MISSOURI**

The Office of the Public Counsel,)	
)	
Complainant,)	
)	
v.)	Case No. TC-2008-0346
)	
Winstar Communications, L.L.C.,)	
)	
Respondent.)	

**STAFF’S SUGGESTION OF BANKRUPTCY AND
PARTIAL MOTION TO DISMISS DUE TO BANKRUPTCY STAY**

COMES NOW Counsel for Staff of the Missouri Public Service Commission (Staff) and respectfully requests the Missouri Public Service Commission (Commission) take notice of Winstar Communications, L.L.C.’s (Winstar) filing for Chapter 11 Reorganization, and moves pursuant to Missouri Rule of Civil Procedure 55.27 (a)(1), (a)(6) and 4 CSR 240-2.116 (4), to dismiss Prayer Relief C and D of the Office of Public Counsel’s (OPC) Complaint. For said Motion, Staff respectfully states the following:

1. Winstar is a telecommunications company and a public utility as defined in Sections 386.020 (51) and 386.020 (42) RSMo (2000), and provides basic local exchange service to customers in Missouri under certificates of service authority issued by the Commission. Winstar is subject to the jurisdiction of the Commission pursuant to 386.250 (2) RSMo (2000).
2. On February 8, 2008, the St. Louis County Circuit Court, Case No. 07SL-CC00576, entered a default judgment on the Commission’s Petition Count One against Winstar. Winstar was ordered to remit \$17,816 to the Commission for payment into the Deaf Relay Service and Equipment Distribution Fund, plus interest in the amount of nine

percent per annum. Winstar was also ordered to pay the Commission's attorney's fees in the amount of \$24,862.50, and costs of \$100.00.

3. On February 8, 2008, the St. Louis County Circuit Court, Case No. 07SL-CC00576, entered a default judgment on the Commission's Petition Count Two against Winstar. Winstar was ordered pursuant to Section 386.600 RSMo (2000), to remit penalties in the amount of \$20,000 to the Public School Fund of the State of Missouri for failure to remit Deaf Relay Fund surcharges, and penalties for failure to file Quarterly Quality of Service Reports pursuant to Section 386.600 (2000). Additionally, Winstar was ordered pursuant to Section 386.600 RSMo (2000), to remit penalties in the amount of \$1,500 to the Public School Fund of the State of Missouri for failure to remit Universal Service Fund surcharges. Finally, under Count Two, Winstar was ordered pursuant to Section 386.600 RSMo (2000), to remit penalties in the amount of \$5,700 to the Public School Fund of the State of Missouri for failure to timely submit Annual Reports.
4. On February 8, 2008, the St. Louis County Circuit Court, Case No. 07SL-CC00576, entered a default judgment on the Commission's Petition Count Three against Winstar, ordering Winstar to collect and remit surcharges for the Missouri Deaf Relay Service and Equipment Distribution Fund and for the Missouri Universal Service Fund, and comply with applicable state laws and Commission rules. Said injunction is still in effect, and Winstar's ongoing compliance with the applicable statutes and rules is within the jurisdiction of the St. Louis County Circuit Court.
5. Rule 55.27(a)(1) of the Missouri Rules of Civil Procedure states "the following defenses may....be made by motion: (1) [l]ack of jurisdiction over the subject matter."

6. Rule 55.27(a)(6) of the Missouri Rules of Civil Procedure states “the following defenses may....be made by motion: (6) [f]ailure to state a claim upon which relief can be granted.”
7. As of the date of this filing, Winstar has failed to pay the judgments awarded in Case No. 07SL-CC00576.
8. Staff is aware of a contract between the Commission and a Michigan law firm for the collection of the judgment awarded in 07SL-CC00576, as described in paragraphs two, three, and four above.
9. On March 19, 2008, Winstar filed for Chapter 11 Bankruptcy in the United States Bankruptcy Court for the Eastern District of Michigan.
10. The contract with the Michigan law firm, as described in paragraph eight above, was entered into before the Commission became aware of the bankruptcy filing. Since the Commission became aware of the bankruptcy filing, the contract with the Michigan law firm has been modified to allow the Michigan law firm to protect the Commission’s interests as a judgment creditor in the bankruptcy proceeding. Due to the bankruptcy proceeding, the Commission is unable to maintain any separate action to enforce the previously obtained money judgment.

Analysis of Prayer Relief C

11. On April 18, 2008, OPC filed a Complaint which asks the Commission in Prayer Relief C to order Winstar to “show cause why it did not comply with the Judgment By Default entered on February 8, 2008, in St. Louis County Circuit Court (Case No. 07SL-CC00576B) and find that this violation is a continuing one.”

12. As the St. Louis County Circuit Court entered an injunction in the Judgment by Default Order, Case No. 07SL-CC00576, it retains jurisdiction over said Order for enforcement.
13. If the Commission issues a show cause order, such order will violate the bankruptcy automatic stay, as provided in paragraphs seventeen through twenty-four below.
14. As such, the Commission, respectfully, lacks subject matter jurisdiction to issue said show cause order.
15. Due to the Commission's lack of subject matter jurisdiction, OPC's Prayer Relief C has failed to state a claim upon which relief can be granted, and therefore, such claim must be dismissed.

Analysis of Prayer Relief D

16. In the same Complaint, OPC asks the Commission in Prayer Relief D to "direct its general counsel to seek the maximum penalty for each day's continuance of this violation."
17. Section 362(a)(6) of the United States Bankruptcy Code states a petition filed...operates as a stay...of any act to collect, assess, or recover a claim against the debtor that arose before the commencement of the case under this title. 11 U.S.C. § 362(a)(6) (2007).
18. The current section of 362(b)(4) of the United States Bankruptcy Code states "[t]he filing of a petition...does not operate as a stay under paragraph (1), (2), (3), or (6) of subsection (a) of this section, of the commencement or continuation of an action or proceeding by a governmental unit ...to enforce such governmental unit's... police and regulatory power, *including the enforcement of a judgment other than a money judgment*, obtained in an action or proceeding by the governmental unit to enforce such

governmental unit's...police or regulatory power.” 11 U.S.C. § 362(b)(4) (2007).
(emphasis added).

19. Prior to 1998, Section 362(b)(4) was separated out into two sections, 362(b)(4) and 362(b)(5), which stated the filing of a petition does not operate as a stay

4) under subsection (a)(1) of this section, of the commencement or continuation of an action or proceeding by a governmental unit to enforce such governmental unit's police or regulatory power;

(5) under subsection (a)(2) of this section, of the enforcement of a judgment, other than a money judgment, obtained in an action or proceeding by a governmental unit to enforce such governmental unit's police or regulatory power[.]

In re Rodriguez, 2008 WL 192963 (Bankr. D. Ariz. 2008). See also, *In re Mohawk Greenfield Motel Corp.*, 239 B.R. 1, 6 (Bankr. D. Mass. 1999). The Chemical Weapons Convention Implementation Act of 1998 combined 362(b)(4) and 362(b)(5), creating the section as quoted in paragraph eighteen above. *In re Mohawk*, at 6.

20. Although a congressionally created exception, no definition for “enforcement of a money judgment” in 362(b)(4) was provided. Therefore, “[i]ts meaning must...be gleaned from the commonly accepted usage and from whatever indications of congressional intent we find persuasive.” *Penn Terra Ltd. v. Department of Environmental Resources, Com. of Pa.*, 733 F.2d 267, 275 (3d Cir. 1984).

21. The Court in *Penn Terra* found the common understanding of “money judgment” as an order entered by the court or by the clerk, after a verdict has been rendered for plaintiff, which adjudges that the defendant shall pay a sum of money to the plaintiff. Essentially, it need consist of only two elements: (1) an identification of the parties for and against whom judgment is being entered, and (2) a *definite* and *certain* designation of the amount which plaintiff is owed by defendant.

Id., citing 49 C.J.S. Judgments, §§ 71-82. (emphasis in original).

22. The legislative history to Section 362(b)(4) states “where a governmental unit is suing a debtor to prevent or stop violation of fraud, environmental protection, consumer protection, safety, or similar police or regulatory laws, *or attempting to fix damages for violation of such a law*, the action or proceeding is not stayed under the automatic stay.” *U.S. v. Jones & Laughlin Steel Corp.*, 804 F.2d 348, 350 (6th Cir. 1986) (emphasis in original), citing H.R. Rep. No. 598, 95th Cong., 1st Sess. 343, *reprinted in* 1978 U.S. Code Cong. & Admin. News 5963, 6299. *See also, State of Mo. v. U.S. Bankruptcy Court for E.D. of Arkansas*, 647 F.2d 768, 775-776 (8th Cir. 1981).
23. The legislative history of the former 362(b)(5) states
- [p]aragraph (5) makes clear that the exception extends to permit an injunction and enforcement of an injunction, and to permit the entry of a money judgment, *but does not extend to permit enforcement of a money judgment*. Since the assets of the debtor are in possession and control of the bankruptcy court, and since they constitute a fund out of which all creditors are entitled to share, enforcement by a governmental unit of a money judgment would give it preferential treatment to the detriment of all other creditors.
- State of Mo.* at 776 (emphasis added), citing H.R. Rep. No. 595, 95th Cong., 1st Sess. 343 (1977), *reprinted in* 1978 U.S. Code Cong. & Admin News 5963, 6299.
24. As 362(b)(5) was combined into 362(b)(4), the legislative history of the section remains applicable.
25. As case law provides, quite distinct is the applicability of the automatic stay when bringing an action attempting to fix damages for violation of a police or regulatory law, verses an action seeking enforcement or collection of money damages or penalties.
26. Section 362 (b)(4) “is intended to be given a narrow construction in order to permit governmental units to pursue actions to protect the public health and safety and *not* to apply to actions by a governmental unit to protect a pecuniary interest in property of the

debtor or property of the estate.” *State of Mo. v. U.S. Bankruptcy Court for E.D. of Arkansas*, 647 F.2d at 776 (emphasis added), citing 124 Cong. Record H 11089, *reprinted in* (1978) U.S. Code Cong. & Admin. News 6436, 6444-6445.

27. For the enforcement or collection of penalties from Winstar, the Commission is required to issue an order instructing Counsel to bring an action in circuit court.
28. Insofar as OPC’s Complaint seeks the enforcement or collection of damages or penalties from Winstar, the automatic stay of 362(a)(6) would prevent such an action.
29. As the automatic stay of 362(a)(6) prevents the enforcement or collection of damages, a circuit court lacks jurisdiction over the subject matter, therefore Prayer Relief D fails to state a claim upon which relief can be granted.

WHEREFORE, Staff respectfully requests the Commission take notice of Winstar Communications, L.L.C.’s filing for Chapter 11 Reorganization and dismiss OPC’s Prayer Relief C and D asking the Commission to order Winstar to “show cause why it did not comply with the Judgment By Default entered on February 8, 2008 in St. Louis County Circuit Court (Case No. 07SL-CC00576B) and find that this violation is a continuing one,” and “direct its general counsel to seek the maximum penalty for each day’s continuance of this violation.” Such request must be dismissed pursuant to the Missouri Rule of Civil Procedure 55.27(a)(1), (a)(6), and 4 CSR 240-2.116(4).

Respectfully submitted,

/s/ Jennifer Hernandez

Jennifer Hernandez

Legal Counsel

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CERTIFICATE OF SERVICE

I certify that the foregoing instrument was sent via electronic mail, facsimile or hand-delivery to counsel for each party to this cause on this 20th day of May, 2008.

/s/ Dawn M. Carafeno