

**STATE OF MISSOURI
PUBLIC SERVICE COMMISSION**

At a session of the Public Service
Commission held at its office in
Jefferson City on the 21st day
of August, 2008.

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

**ORDER TO SHOW CAUSE BASED ON
FINDING OF DEFAULT**

Issue Date: August 21, 2008

Effective Date: August 29, 2008

Background

On April 18, 2008 the Office of the Public Counsel filed a complaint with the Missouri Public Service Commission against Winstar Communications, L.L.C. Public Counsel alleges that in February of 2008, the Commission obtained default judgments against Winstar for money damages in the Circuit Court of St. Louis County. Those damages represent unpaid obligations for Deaf Relay Services and Equipment Distribution Fund surcharges, and Missouri Universal Service Fund surcharges. The Commission also obtained judgments in default for Winstar's failure to file its quarterly quality of service reports and Annual Reports.

For its relief, Public Counsel requests that the Commission: A) issue an order directing Winstar to show cause why its certificate of service authority should not be

terminated; B) establish a procedural schedule and provide for an evidentiary hearing on Public Counsel's complaint and on whether Winstar's certificate should be terminated; C) to show cause why it did not comply with the Judgment By Default entered on February 8, 2008 in St. Louis County Circuit Court and that this violation is a continuing one; D) direct its general counsel to seek the maximum penalty for each day's continuance of this violation; E) direct its general counsel to pursue all remedies to implement and enforce termination of Winstar's certificate of service authority; F) provide for the orderly transition of customers from Winstar to other carriers; and G) such other relief as the Commission deems proper.

On April 23, the Commission issued a notice of the complaint to Winstar directing the company to file an answer to the complaint within 30 days. In that notice, the Commission also directed the Staff of the Commission to file an investigative report. Winstar failed to file its answer. Staff, on the other hand, filed its Suggestion of Bankruptcy and Partial Motion to Dismiss Due to Bankruptcy Stay.

Staff's Suggestions of Bankruptcy and Partial Motion to Dismiss Due to Bankruptcy Stay

In its pleading, Staff informs the Commission of several money damages awarded upon default against Winstar. However, Staff further states that on March 19, 2008, Winstar filed for Chapter 11 Bankruptcy in the Federal District Court and that due to the Bankruptcy proceeding, the Commission is unable to maintain any separate action to enforce the previously obtained money judgment.

Staff points out that under 11 U.S.C §362(a)(6) of the U.S. Bankruptcy Code, the filing of Winstar's petition in Bankruptcy Court 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. The Commission is not, however, precluded from enforcing its police and regulatory power, including the enforcement of a judgment other than a money judgment. In light of the above, Staff suggests that the Commission dismiss Public Counsel's requests that the Commission issue an order to show cause why [Winstar] did not comply with the Judgment by Default on February 8, 2008 in St. Louis County Circuit Court, find that the violation is a continuing one and to direct that its general counsel seek the maximum penalty for each day's continuance of this violation.

Public Counsel's Voluntary Dismissal

In response to Staff's suggestion, Public Counsel filed a pleading voluntarily dismissing those counts, the relief of which would be in violation of the automatic stay arising from Winstar having filed a petition in bankruptcy.

Finding of Default

On April 23, 2008, the Commission issued its Notice of Complaint to Winstar's address in McLean, Virginia as listed in the Commission's records. Winstar was directed to file its answer no later than May 23. The notice was returned as unclaimed. The Commission thereafter issued a second notice to Winstar at an address in Detroit, Michigan and to a registered agent in Clayton, Missouri. Winstar was directed to file an answer no later than July 23. Thereafter, a certified mail receipt, signed by the registered agent, was returned to the Commission. Winstar, however, failed to file an answer.

Under Commission rule,¹ if a respondent in a complaint case fails to file a timely answer, the complainant's averments may be deemed admitted and an order granting default entered. Because Winstar has failed to file a timely answer, the Commission finds

¹ Commission rule 4 CSR 240-2.070 (9).

the company in default. Hence, the averments not dismissed by Public Counsel and set out in its complaint are deemed admitted and, with the exception of that which is stayed by the company having filed for bankruptcy, the Commission shall grant the requested relief.

Discussion

Bankruptcy

Under the Bankruptcy Code², a filing of a petition operates as an automatic stay. However, under a separate section of the rule³, an exception is made for “an action or proceeding by a governmental unit . . . to enforce such governmental unit’s police power” This exception has been interpreted to specifically apply to agency actions.⁴ Furthermore, in *Eddleman*, the court developed a two-prong test to determine whether an agency action fits with the exception. If the governmental action is to protect a “pecuniary interest”, then the exception does not apply. On the other hand, if the action is aimed at effectuating public policy, then the action falls under the exception.

Public Counsel dismissed those claims, the relief of which may violate the automatic stay. Namely, that the Commission direct the company to show cause why it did not comply with the Judgment By Default entered on February 8, 2008 in St. Louis County Circuit Court and that this violation is a continuing one, and that the Commission direct its general counsel to seek the maximum penalty for each day’s continuance of this violation.

Having dismissed these requests for relief, the remaining relief that Public Counsel seeks is that the Commission: 1) issue an order to the company to show cause why its certificate should not be cancelled; 2) establish a procedural schedule and provide for an

² 11 U.S.C. §362(a).

³ 11 U.S.C. §362 (b)(4).

⁴ *Eddleman v. United States Department of Labor*, 923 F.2d 782 (10th Cir. 1991).

evidentiary hearing on whether Winstar's certificate should be revoked; 3) direct its General Counsel to pursue all remedies to enforce termination of Winstar's certificate; and 4) provide for the orderly transition of customers from Winstar to other carriers.

Because Winstar has failed to respond to this complaint and is in default, the Commission will grant Public Counsel's request that Winstar be directed to show cause why its certificate should not be cancelled. However, setting a procedural schedule and directing General Counsel to pursue remedies to cancel the company's certificate is premature and presumes the company is unable to show cause as to why its certificate should not be cancelled. Hence, the Commission will not grant these requests.

IT IS ORDERED THAT:

1. Winstar Communications, L.L.C. shall file a pleading no later than September 10, 2008, stating why the Commission should not cancel the company's certificate.

2. This order shall become effective on August 29, 2008.

BY THE COMMISSION

A handwritten signature in black ink, appearing to read 'Colleen M. Dale', is written over a horizontal line.

Colleen M. Dale
Secretary

(S E A L)

Davis, Chm., Murray, Clayton,
Jarrett, and Gunn, CC., concur.

Jones, Senior Regulatory Law Judge