

**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 RESPONSE TO THE ORDER DIRECTING FILING**

**COMES NOW** Staff of the Missouri Public Service Commission (Staff), through Counsel, and respectfully submits to the Missouri Public Service Commission (Commission) its Response to the Commission’s August 13, 2008 Order Directing Filing.

1. On August 13, 2008, the Commission issued its Order Directing Filing, directing the General Counsel to submit a pleading “setting out its position with regard to canceling Winstar Communications, L.L.C.’s [(Winstar)] certificate of service authority to provide basic local telecommunications services.”

2. Staff’s May 20, 2008 Suggestion Of Bankruptcy And Partial Motion To Dismiss Due To Bankruptcy Stay addressed The Office of Public Counsel’s (OPC) Complaint prayers C and D, but did not respond directly to prayers A, B, E, F, or G.

**Prayer for Relief A: After Hearing, The Commission May Terminate  
Winstar’s Certificate of Service Authority**

3. Section 392.410.1 RSMo (Supp. 2007) requires a telecommunications company to apply for a certificate of service authority prior to transacting any business within the state.

4. On April 17, 2002, the Commission certificated Winstar to provide basic local exchange services in Case No. TA-2002-352, and resold and facilities-based interexchange

telecommunications services and nonswitched local exchange services in Case No. TA-2002-0353.

5. Pursuant to Section 392.200.1 RSMo (Supp. 2007), “[e]very telecommunications company shall furnish and provide with respect to its business such instrumentalities and facilities as shall be adequate and in all respects just and reasonable.”

6. As Staff’s May 20, 2008 filing noted, Winstar filed for Chapter 11 reorganization bankruptcy on March 19, 2008, in the United States Bankruptcy Court for the Eastern District of Michigan. Winstar, in violation of Commission rule 4 CSR 240-3.565, failed to inform the Commission of its bankruptcy filing.

7. On July 14, 2008, Winstar’s case was converted to a Chapter 7 liquidation proceeding.

8. Two statutes, Sections 392.220.6 and 392.248.3 RSMo (2000), provide express authority for the Commission to revoke a telecommunications company’s certificate of service authority.

9. Pursuant to 392.220.6 RSMo (2000), “[i]f after notice and hearing, the commission determines that a telecommunications company has violated the requirements of section 392.200 or this section, it may revoke the certificate of service authority under which that telecommunications company operates[.]”

10. Section 362(a)(6) of the United States Bankruptcy Code states that the filing of a petition operates as a stay of any act to collect, assess, or recover a claim against a debtor that arose before the commencement of the bankruptcy case. 11 U.S.C. Section 362(a)(6) (2007). However, Section 362(b)(4) provides that the filing of a petition does not operate as a stay of the commencement or continuation of an action or a 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.

11. Because the Public Service Commission Law is bottomed on and referable to the police power of the state (*See State ex rel. Laundry, Inc. v. Public Service Commission*, 34 S.W.2d 37, 42 (Mo. 1931)), Winstar's bankruptcy petition does not operate as an automatic stay to a proceeding to revoke its certificate based on its failure to comply with a Public Service Commission Law, so long as that proceeding is not an attempt to collect on a pre-petition debt. Counsel for the Staff notes the record in this case currently contains no claims alleging Winstar is in violation of section 392.200 or 392.220. However, if the Commission determines after notice and hearing that Winstar has violated a requirement of section 392.200 or 392.220, such as the requirement of section 392.200.1 to furnish and provide adequate, just and reasonable instrumentalities and facilities, the Commission has statutory authority to revoke Winstar's certificate.

12. Pursuant to section 392.248.3 RSMo (2000), "[a] telecommunications company that fails to pay an [Missouri Universal Service Fund] assessment that is due and payable pursuant to this section may have its certificate revoked....after notice and hearing." Counsel for Staff notes the record in this case currently contains no information concerning Winstar's post-petition obligations to the Commission. Post-petition obligations, unlike pre-petition obligations, are not barred by the bankruptcy code's automatic stay provisions. *Taylor v. First Federal Sav. & Loan Ass'n of Monessen*, 843 F.2d 153 (3rd Cir. 1988). If Winstar has failed to pay post-petition Universal Service Fund assessments, the Commission could revoke Winstar's certificate through 392.248.3 RSMo (2000), after notice and hearing.

**Prayers for Relief B, E, F, and G Procedurally Flow**  
**From A Section 392.220.6 Hearing**

13. Prayer Relief B requests the Commission to “establish a procedural schedule and provide for an evidentiary hearing on Public Counsel’s complaint and on whether or not Winstar’s certificate should be revoked.” Section 392.220.6 RSMo (2000) provides for a hearing as to whether Winstar’s certificate should be revoked.

14. Prayer Relief E requests the Commission “direct its general counsel to pursue all remedies to implement and enforce termination of Winstar’s certificate of service authority.” After hearing the Commission may, pursuant to 386.240 and 386.600 RSMo (2000), order the relief sought in this prayer.

15. Prayer Relief F requests the Commission “provide for the orderly transition of customers from Winstar to other carriers.” The relief requested procedurally flows from a revocation hearing, Section 386.240, and 386.600 RSMo (2000). As such, the Commission may grant it after hearing.

16. Additionally, Staff’s July 7, 2008 customer base Report identifies that Winstar is currently using AT&T Missouri facilities to provide service. To ensure orderly transition of customers, Counsel for Staff suggests the Commission join AT&T Missouri as a necessary party to this case.

17. For Prayer Relief G, OPC requests the Commission to order any other relief it deems proper. The Commission may grant any relief it deems proper, but within the Commission’s jurisdiction in Section 386.250 RSMo (2000).

**WHEREFORE**, Staff respectfully submits its Response To The Order Directing Filing and (1) advises the Commission it may grant the relief requested in The Office of Public

Counsel's April 18, 2008 Complaint, prayers A, B, E, F, and G; and (2) requests that AT&T Missouri be joined as a necessary party to any revocation hearing the Commission may order.

Respectfully submitted,

**/s/ Jennifer Hernandez**

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### **Certificate of Service**

I hereby certify that copies of the foregoing have been mailed, hand-delivered, transmitted by facsimile or electronic mail to all counsel of record this 20th day of August 2008.

**/s/ Jennifer Hernandez**