[Service Date January 24, 2008]

BEFORE THE WASHINGTON STATE UTILITIES AND TRANSPORTATION COMMISSION

In the Matter of the Petition for Arbitration of an Interconnection Agreement Between	)	DOCKET UT-073031
	)	ORDER 04
SPRINT COMMUNICATIONS COMPANY L.P.	)	ORDER DETERMINING THRESHOLD ISSUES
with	)	
WHIDBEY TELEPHONE COMPANY	)	
Pursuant to 47 U.S.C. Section 252(b).	)	
. . . . .	)	

1 ***SYNOPSIS.*** *In this Order, the Arbitrator rejects three objections Whidbey Telephone Company raises as conditions precedent to entering negotiations with Sprint Communications Company L.P. for an interconnection agreement. The Arbitrator concludes that under the Telecommunications Act of 1996, Whidbey is obligated to enter into the requested negotiations with Sprint. The Arbitrator also concludes that Whidbey has breached its duty under the Act to negotiate in good faith.*

I. INTRODUCTION

2 **NATURE OF PROCEEDING.** On October 17, 2007, Sprint Communications Company L.P. (Sprint) filed with the Washington Utilities and Transportation Commission (Commission) a request for arbitration pursuant to 47 U.S.C. § 252(b) of the Telecommunications Act of 1996, Public Law No. 104-104, 101 Stat. 56 (1996) (Act). The petition was served on Whidbey Telephone Company (Whidbey).

3 **THRESHOLD ISSUES RAISED BY WHIDBEY.** On November 2, 2007, Whidbey filed a Motion for an Order of Dismissal for Lack of Jurisdiction (Motion to Dismiss) that referenced "threshold issues" allegedly preventing Whidbey from entering into voluntary negotiations with Sprint with regard to an interconnection

agreement (ICA).[1] On November 16, 2007, Whidbey filed its Answer to Sprint's Petition for Arbitration (Answer), specifically setting out the three fundamental "threshold issues" for determination prior to negotiating with Sprint,[2] as follows:

4 Issue 1. Is Whidbey required to provide local interconnection to Sprint where the principal, if not the sole purpose for the interconnection, is to facilitate the provision of telecommunications service by an entity that is not registered with the Commission as a telecommunications company, as required by RCW 80.36.350?

5 Issue 2. With respect to the local interconnection that Sprint seeks from Whidbey, is Sprint a "telecommunications carrier," as that term is defined in the Act for purposes of Section 251 and, to the extent applicable, Section 252 of the Act?

6 Issue 3. With respect to the South Whidbey Rate Center, is Sprint eligible to submit to Whidbey a bona fide request for local number portability (LNP)?

7 At a prehearing conference held on November 26, 2007, the Arbitrator agreed to decide these "threshold issues" separately and in advance of the arbitration hearing. In Order 03, the Arbitrator required both parties to file responsive briefs on the threshold issues. On December 7, 2007, Sprint filed its brief and the declaration of James Burt. On December 17, 2007, Whidbey filed its brief.

8 **Initial Order on Threshold Issues.** The Arbitrator finds that Sprint's contemplated wholesale and retail service arrangements and choice of business partner(s) are irrelevant to Whidbey's obligation to negotiate an ICA under the Act. Further, the Arbitrator finds that Sprint is a "telecommunications carrier" as defined in Section 251 of the Act for all purposes relevant to this proceeding. Finally, the Arbitrator finds that Sprint is eligible to submit a bona fide LNP request to Whidbey in this matter.

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[1] *See* Whidbey Motion to Dismiss, ¶¶ 33-35; Exhibit C6 (July 6, 2007, letter from DeMartini to Danilov). The Arbitrator denied Whidbey's Motion to Dismiss, but deferred resolution of the threshold issues.

[2] *See* Whidbey Answer, ¶¶ 15-18.

II. MEMORANDUM

A. Millennium Cable's Registration Status with the Commission.

9 In its petition for arbitration, Sprint notes its status as a competitive local exchange carrier (CLEC) registered with the Commission. Sprint's petition also states that it proposes to provide interconnection services for Millennium Cable Company (Millennium) which will in turn provide VoIP (Voice over Internet Protocol) services.[3] Millennium is not registered as a telecommunications company with the Commission.

10 Whidbey argues that it can not be required to negotiate an ICA with Sprint when the primary purpose of the requested ICA is to allow Sprint to provide local service to Millennium, an unregistered telecommunications company. Whidbey relies on Revised Code of Washington (RCW) 80.36.350 and various penalty provisions of RCW 80.04 in support of its position. Whidbey also cites to Commission regulations on telecommunications billing practices as contained in Washington Administrative Code (WAC) 480-120.

11 RCW 80.36.350 requires each telecommunications company not operating under tariff in Washington to register with the Commission before beginning its operations in Washington. The statute requires the Commission to act on an application for registration within thirty days of receipt. Whidbey argues at great length to point out Millennium's potential *eventual* obligations to comply with this law (i.e. the company will have to register with the Commission before offering services in Washington).

12 RCW 80.04.380, .385, .387, and .390 subject officers, agents, and employees of public service companies (including telecommunications companies) to various financial and criminal penalties for committing, aiding, or abetting violations of RCW 80.04. Whidbey expresses fear of such penalties if it were to negotiate an ICA with Sprint knowing that Sprint intends to offer fixed interconnected VoIP service by partnering with Millennium, an as yet unregistered telecommunications company.[4]

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[3] *See* Sprint Petition, ¶ 22; *see also* Exhibit B to Petition, Draft Interconnection Agreement, ¶ 2.1.
[4] At this time, the Commission has not yet been asked nor has it ruled on the regulatory status of fixed-VoIP service offerings in Washington and those entities that seek to provide them.

13 Finally, Whidbey argues that under WAC 480-120-161(9), a company such as Sprint can only bill for regulated telecommunications charges if it is billing on behalf of a telecommunications company properly registered in Washington. Whidbey points out that Sprint would be violating this regulation if it billed on behalf of Millennium.

14 Sprint takes the position that Whidbey's arguments regarding its potential future business relations with Millennium are simply a "red herring."

15 **Decision.** Whidbey's opposition to enter into ICA negotiations with Sprint is misplaced. First, Millennium is not the entity seeking an ICA with Whidbey; Sprint is seeking to negotiate the ICA. Whidbey's focus must be on Sprint, not on Millennium.

16 Second, despite Whidbey's apparent concern, the Commission has never penalized or sought to hold criminally liable any incumbent local exchange carrier (ILEC) or similarly situated entity for complying with its obligations to negotiate an ICA under the Telecommunications Act. Whidbey's arguments here are pure speculation.

17 Third, nothing in RCW 80.36.350 requires a telecommunications company to register with the Commission prior to negotiating a contract to obtain the necessary infrastructure or interconnection arrangements to deliver telecommunications services. Similarly, nothing in WAC 480-120 prohibits Sprint from seeking to negotiate an ICA to facilitate a business arrangement with Millennium prior to ensuring its potential business partner is registered with the Commission. The statutory and regulatory requirements have only one timing requirement: a company must register with the Commission before providing services in Washington.

18 Millennium Cable's registration status with the Commission is simply irrelevant to Whidbey's obligations to negotiate an ICA with Sprint. Whidbey's concentration on Millennium's status before the Commission appears to be exaggeratedly cautious and perhaps a disingenuous step to delay its obligations to negotiate an ICA with Sprint.[5]

[5] After making extensive argument that it should not be required to negotiate with Sprint unless and until Millennium registers with the Commission, Whidbey nevertheless claims that its position is *not* inconsistent with 47 CFR §51.301(c)(4). *See* Brief in Support of Whidbey's Answer, ¶¶ 13-14. This FCC rule explicitly warns ILECs, such as Whidbey, that their duty to negotiate ICAs in good faith is violated by "conditioning negotiation on a requesting telecommunications carrier first obtaining state certifications." Despite its assertions to the contrary, this is *exactly* what Whidbey has done in this matter. As Shakespeare wrote in *Hamlet* (Act III, Scene 2), Whidbey "doth protest too much, methinks," essentially forcing the Arbitrator

Therefore, the Arbitrator rejects Whidbey's position as an incorrect and tortured reading of the law.

B. Sprint's Status as a "Telecommunications Carrier" under the Act.

19 Whidbey next contends that Sprint must first prove that it is a "telecommunications carrier" before Whidbey is required under Section 251(a) of the Act to enter negotiations with Sprint for an ICA.

20 The terms "telecommunications carrier" and "telecommunications services" are defined in Section 153(44) and Section 153(45) of the Act as follows:

> The term "telecommunications carrier" means any provider of telecommunications services, except that such term does not include aggregators of telecommunications services (as defined in section 226 of this title). A telecommunications carrier shall be treated as a common carrier under this chapter only to the extent that it is engaged in providing telecommunications services, except that the [Federal Communications] Commission shall determine whether the provision of fixed and mobile satellite service shall be treated as common carriage.
>
> The term "telecommunications services" means the offering of telecommunications for a fee directly to the public, or to such classes of users as to be effectively available to the public, regardless of the facilities used.

21 On March 1, 2007, the Federal Communications Commission (FCC) issued a Memorandum Opinion and Order known as the *Time Warner* decision.[6] In that case, a cable company asked the FCC to affirm that telecommunications carriers are entitled to obtain interconnection with ILECs to provide wholesale telecommunications services to other service providers and clarify that interconnection rights under Section 251 are not based on the identity of the wholesale carrier's customer.[7] The FCC's decision confirmed that

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to take up the request for sanctions in Sprint's Petition at this time. *See* ¶¶ 39-44 of this order.
[6] *In the Matter of Time Warner Request for Declaratory Relief,* WC Docket No. 06-55 (DA 07-709), 22 FCC Rcd. 3513 (2007).
[7] *Id.*, ¶ 4.

"telecommunications services" are not limited to retail services, but also include wholesale services when offered on a common carrier basis; the FCC noted that this common carrier requirement can be met when an entity holds itself out "to serve indifferently all potential users."[8]

22 Sprint relies on the *Time Warner* decision as validation of the initial business model it intends to use in Whidbey's service territory as a provider of wholesale telecommunications services to Millennium in order for Millennium to connect its VoIP service customers with the public switched telephone network operated by Whidbey.

23 Initially, Whidbey argued that Sprint had not offered any evidence that it would be offering local exchange services to Millennium as a common carrier.[9] Since that time, Sprint has filed the Declaration of James R. Burt, which Whidbey concedes "provides information that goes towards demonstrating that Sprint meets the FCC's *Time Warner* test to be a telecommunications carrier."[10]

24 Even so, Whidbey continues to assert that Sprint can not qualify as a common carrier without a showing that it will be offering services to its class of customers throughout Washington, or at least within the geographic areas for which it seeks interconnection from Whidbey, on an indiscriminate basis.[11]

25 **Decision.** As Whidbey notes, a key determinant of common carrier status is whether an entity holds itself out to serve indiscriminately.[12] One way of testing this status is whether the services Sprint wishes to provide would be available to all end users within Millennium's specified service territory.[13]

26 The Declaration of James R. Burt confirms in paragraph 6 that Sprint, through its business arrangement with Millennium, intends to service "subscribers within the serving footprint of the cable television" company and notes that Sprint's joint provisioning arrangement with Millennium is "positioned to compete directly with ILEC voice services."

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[8] *Id.*, ¶¶ 11-12.
[9] *See* Brief in Support of Whidbey's Answer, ¶¶ 18-19.
[10] *See* Whidbey Brief on Threshold Issues, ¶ 15.
[11] *See* Whidbey Brief on Threshold Issues, ¶¶ 16-28.
[12] *Virgin Islands Telephone v. FCC*, 198 F.2d 921, 927 (D.C. Cir 1999).
[13] *See* Whidbey Brief on Threshold Issues, ¶ 24, citing to *Berkshire Telephone Corp. v. Sprint Communications Co., LP*, 206 WL 3095665 (W.D.N.Y.) (2006).

27 Mr. Burt's declaration does not expressly note that Sprint, through Millennium, will offer VoIP services to *all* end users within Millennium's service territory. However, the obvious intent of Sprint and Millennium entering into their joint provisioning arrangement appears to be for the two business partners to offer telecommunications services to the entirety of Millennium's customer base of cable subscribers.

28 Further, although Mr. Burt's declaration does not set out the specific pricing option(s) to be offered to the Sprint-Millennium customers, there is no indication that Sprint intends to individually negotiate contracts based on price or other terms which would vary from one Millennium subscriber to another. Again, the clear intent of Sprint's joint provisioning arrangement with Millennium appears to be offering new telecommunications services to an existing group of customers. The weight of evidence in the record demonstrates that Sprint will make these services available to all of Millennium's customers indiscriminately.

29 Whidbey's demand for additional details of the customer relationship between Sprint and Millennium's subscriber base is unnecessary or premature. Therefore, Whidbey's remaining objection to Sprint's qualifications as a "telecommunications carrier" under the Act is rejected.[14]

C. Sprint's Eligibility to Request Local Number Portability.

30 Finally, Whidbey argues that Sprint is not eligible to submit a request for local number portability (LNP) under Section 251(b)(2) of the Act. Although Whidbey concedes that it has a duty to provide LNP, Whidbey contends that 47 CFR §52.23 creates certain prerequisites to any LEC complying with the Act.

31 In this case, Sprint submitted a letter to Whidbey dated May 2, 2007, identified as its LNP "bona fide request". In that letter, Sprint noted its intention to "operate in the service area of and has sent or will be sending a request to negotiate an interconnection agreement with Whidbey" and further explained that:

> Sprint CLEC will utilize the Service Provider ID (SPID) of 8712 to provide telecommunications services in Washington and to place local number porting requests with your company. Specifically, Sprint

[14] If information arises at a later time to indicate that the Sprint-Millennium service will not be offered indiscriminately, Whidbey can raise an objection or file a complaint at that time.

> requests local number portability capabilities in the rate centers outlined in the attached document [*a Bonafide Request Form that references the South Whidbey Rate Center and lists seven common language location identifier (CLLI) switch codes*].

The letter requested that Whidbey provide Sprint with the status of the South Whidbey Rate Center as to LNP capabilities (i.e. software, hardware, remotes).[15]

32 On May 15, 2007, Whidbey responded and advised that "none of the Whidbey switching entities currently providing local exchange service to that [South Whidbey] rate center has the deployed capability to provide LNP." Whidbey's letter went on to question Sprint's eligibility for LNP and therefore requested that Sprint provide "solid evidence" of its plans to operate in the South Whidbey Rate Center, particularly with respect to non-wireless local exchange service. Whidbey also asked Sprint to identify the CLLI codes of Sprint's switching entities to which Sprint anticipated Whidbey would be requested to port local telephone numbers assigned within the South Whidbey Rate Center.[16]

33 In a subsequent exchange of correspondence, Sprint confirmed its plans to operate in and provide non-wireless local exchange services in the South Whidbey Rate Center and listed again the same seven CLLI codes it had previously noted in its bona fide request.[17] Whidbey continued to respond that Sprint had neither provided the requested evidence of Sprint's plans or intentions to operate in the South Whidbey Rate Center, nor had it provided the requested Sprint CLLI codes.[18] In essence, Whidbey unilaterally refused Sprint's bona fide request because Whidbey determined that it had not received necessary information.

34 Whidbey's arguments center on two alleged deficiencies in Sprint's LNP request: (a) the purported requirement that Sprint make available to Whidbey a list of its switches for which LNP has been requested as per 47 CFR §52.23(b)(2)(iii) and (b) Sprint's failure to provide evidence of its plans to be a telecommunications carrier within the South Whidbey Rate Center in accordance with 47 CFR §52.23(c).[19]

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[15] *See* Whidbey Answer, Attachment 4, Exhibit 1.
[16] *See* Whidbey Answer, Attachment 4, Exhibit 2.
[17] *See* Whidbey Answer, Attachment 4, Exhibits 5 and 7.
[18] *See* Whidbey Answer, Attachment 4, Exhibits 6 and 8.
[19] *See* Brief in Support of Whidbey's Answer, ¶¶ 23-26.

35 **Decision.** Neither of Whidbey's positions is persuasive. First, the reciprocal obligation of listing switches for which LNP has or has not been requested that Whidbey seeks to impose on Sprint does not exist within 47 CFR §52.23(b)(2). In relevant part, that regulation states:

> (2) Any procedure to identify and request switches for deployment of number portability must comply with the following criteria:
>
> > (iii) A LEC must make available upon request to any interested parties a list of its switches for which number portability has been requested and a list of its switches for which number portability has not been requested.

Thus, Sprint's request for LNP triggered Whidbey's obligation to make available the list of switches. Whidbey's request for further information from Sprint, apparently to allow evaluation of potential reciprocity of LNP between LECs or to eventually facilitate the number porting and associated telecommunications traffic, is a separate matter and can not act to defeat Whidbey's initial LNP obligations that were activated by Sprint's bona fide request.

36 Whidbey's current reliance on the FCC's very recent *LNP Order*,[20] issued on November 8, 2007, provides no justification for Whidbey's dilatory tactics in the nearly six-month period between Sprint's LNP request and the FCC's subsequent *LNP Order*. Had Whidbey timely honored Sprint's LNP request, the *LNP Order* might not have been interjected into this proceeding; nevertheless, even now, the *LNP Order* does not support Whidbey's position.

37 Second, Whidbey provides no authority for the "evidence" it is demanding from Sprint. The FCC regulation only requires that Sprint be operating or plan to operate in the South Whidbey Rate Center. To comply with 47 CFR §52.23(c), Sprint need only state such intentions and it has done so on numerous occasions. Whidbey's continued demands for additional evidence of Sprint's plans are inexplicable.

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[20] *In the Matter of Telephone Number Requirements for IP-Enabled Services Providers, et al.*, CC Declaratory Ruling, Order on Remand, and Notice of Proposed Rulemaking, Docket No. 95-116 et al., Report and Order, FCC 07-188 (November 8, 2007) ("*LNP Order*").

38 Simply put, Section 251(b)(2) obligates Whidbey to provide, to the extent technically feasible, number portability in accordance with requirements prescribed by the FCC. Whidbey has failed to honor Sprint's LNP request without any lawfully recognizable rationale.

D. Whidbey's Violation of Duty to Negotiate in Good Faith.

39 Sprint's Petition raised allegations that Whidbey has failed to negotiate the requested ICA in good faith. Although neither party submitted briefing on this topic, in the course of briefing the threshold issues taken up in this order, the record is sufficiently complete that the Arbitrator chooses to begin addressing the matter at this time.

40 FCC regulations require ILECs to "negotiate in good faith the terms and conditions of agreements to fulfill the duties established by sections 251(b) and (c) of the Act." Under 47 CFR §51.301(c), the following actions or practices, if proven to an appropriate state commission, violate the duty to negotiate in good faith:

> (4) Conditioning negotiation on a requesting telecommunications carrier first obtaining state certifications; and
>
> (6) Intentionally obstructing or delaying negotiations or resolutions of disputes.

41 As noted above, Whidbey has continuously demanded that Sprint provide assurances that Millennium is or will become registered with the Commission before Whidbey would engage in negotiations with Sprint. Although Whidbey has not demanded that Sprint, the requesting telecommunications carrier, obtain additional state certifications, its demands that Sprint's business partner Millennium do so equates to a violation of 47 CFR §51.301(c)(4).

42 Further, Whidbey's pattern of behavior with Sprint has been to place hurdle after hurdle in front of the clear language of its statutory and regulatory requirements. Whidbey's ongoing refusal to negotiate with Sprint on the various bases set out in its "threshold issues" rise to the level of obstructionism and intentional creation of impediments to Whidbey's interconnection obligations. Whidbey is also in violation of 47 CFR §51.301(c)(6).

43 In light of Whidbey's violations, the Arbitrator now invites Sprint to submit additional briefing on the remedies available to the Commission in this situation. Sprint's briefing should address the authority of a state commission to sanction a LEC for violation of its duty to negotiate in good faith under Section 251(c) of the Act, including the implications of Section 252(b)(5) of the Act; 47 U.S.C. §§ 501-503; 47 CFR 51.301(c); and *In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996,* CC Docket No. 96-98, FCC 96-325 (August 8, 1996), ¶¶ 138-156. Sprint's briefing should also call attention to any relevant instances of state commissions imposing sanctions for a company's failure to negotiate in good faith. Sprint may include any other authority and argument it deems appropriate and relevant to this matter.

44 If Sprint seeks for the Arbitrator to impose any remedy for Whidbey's failure to negotiate in good faith, its brief shall be due no later than March 14, 2008, submitted in conjunction with or as part of the Post-Hearing Opening Brief already noted in the procedural schedule. Whidbey's response brief, as needed, shall be due on March 24, 2008, submitted in conjunction with or as part of the Post-Hearing Response Brief already noted in the procedural schedule.

III. FINDINGS OF FACT

45 (1) The Washington Utilities and Transportation Commission is an agency of the State of Washington, vested by statute with authority to arbitrate interconnection agreements. 47 U.S.C. § 252; RCW 80.36.610(1).

46 (2) Sprint is a competitive local exchange carrier (CLEC) registered with the Commission.

47 (3) Whidbey is an incumbent local exchange carrier (ILEC) authorized to provide local exchange services in Washington.

48 (4) Sprint attempted to initiate negotiation of an ICA with Whidbey in May 2007. Sprint also requested LNP from Whidbey at approximately the same time.

49 (5) Sprint intends to offer telecommunications services in the Whidbey's service territory, including the Whidbey South Rate Center, through a partnership with Millennium Cable Company. At this time, Millennium is not registered as a telecommunications company with the Commission.

50 (6) Sprint intends to offer wholesale telecommunications services indiscriminately to Millennium Cable's customers.

IV. CONCLUSIONS OF LAW

51 (1) The Commission has jurisdiction over the subject matter of this proceeding and over the dispute between Sprint and Whidbey pursuant to RCW 80.01.040, RCW 80.36.610(1) and WAC 480-07-630.

52 (2) Under RCW 80.36.350, Millennium Cable need not be registered with the Commission prior to beginning operations in Washington. In isolation, Sprint's negotiation of an ICA with Whidbey that contemplates Millennium's future operations in Washington does not require Millennium to be registered with the Commission.

53 (3) Whidbey's demand that Millennium register with the Commission before Whidbey be required to enter interconnection negotiations with Sprint is improper under the Act.

54 (4) Sprint's status as a competitive telecommunications carrier and its proposed business arrangements with Millennium make it a "telecommunications company" as defined by the Telecommunications Act and further described in the FCC's *Time Warner* decision.

55 (5) Sprint is eligible to request LNP from Whidbey.

56 (6) Whidbey is obligated under Section 251 of the Act to enter into good faith negotiations with Sprint to establish interconnection.

57 (7) Whidbey's delays and refusals to negotiate with Sprint violate its duty to negotiate in good faith as contained in Section 251(c)(1) of the Act and further explained in 47 CFR §51.301(c)(4) and (6).

ORDER

THE COMMISSION ORDERS:

58 (1) Whidbey Telephone Company's threshold issues are each resolved in favor of Sprint Communications Company L.P. and dismissed at this time.

59 (2) Whidbey Telephone Company must promptly enter into good faith negotiations with Sprint Communications Company L.P. to develop a mutually acceptable interconnection agreement as required by Sections 251 and 252 of the Telecommunications Act of 1996.

60 (3) The Commission retains jurisdiction to effectuate the terms of this Order.

DATED at Olympia, Washington, and effective January 24, 2008.

WASHINGTON STATE UTILITIES AND TRANSPORTATION COMMISSION

ADAM E. TOREM
Arbitrator