BEFORE THE
WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

In the Matter of the Petition of Sprint Communications Company L.P. for Arbitration with Whidbey Telephone Company	Docket No. UT-073031 PETITION FOR INTERLOCUTORY REVIEW

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I. INTRODUCTION

1 Pursuant to WAC 480-07-810, Whidbey Telephone Company ("Whidbey") hereby petitions for interlocutory review of Order 04 entered in this docket. The specific issue for which interlocutory review is sought is the determination made by the administrative law judge ("ALJ" or "Arbitrator") that Whidbey violated a duty to negotiate in good faith.

2 As explained more fully below, the basis for seeking interlocutory review is that the determination by the ALJ violates Whidbey's rights to due process, denies Whidbey an opportunity to be heard on the subject, denies Whidbey notice of the issues to be determined and is arbitrary and capricious and in violation of law.

II. BASIS FOR INTERLOCUTORY REVIEW

3 Under WAC 480-07-810(2), interlocutory review is available under certain defined circumstances. WAC 480-07-810(2) provides that the Commission may accept review of interim or interlocutory orders in adjudicative proceedings[1] if it finds that:

> (a) the rule terminates a party's participation in the proceeding and the party's inability to participate thereafter could cause it substantial and irreparable harm;
>
> (b) a review is necessary to prevent substantial prejudice to that party that would not be remediable by post-hearing review; or
>
> (c) a review would save the Commission and the parties substantial effort or expense, or some other factor is present that outweighs the cost in time and delay of exercising review.

[1] While an arbitration is not considered to be an adjudicative proceeding (as stated in WAC 480-07-630(2) "arbitration under this section, however, is not an adjudicative proceeding...") interlocutory review has been granted in arbitrations in the past. See, e.g., In the Matter of the Petition for Arbitration of an Amendment to Interconnection Agreements of Verizon Northwest Inc. with Competitive Local Exchange Carriers and Commercial Radio Service Providers in Washington Pursuant to 47 U.S.C. §252(b), and the *Triennial Review Order*, Docket No. UT-043013, Order No. 08 (August 15, 2004).

Whidbey respectfully submits that interlocutory review is available under WAC 480-07-810(2)(b) and (c).[2]

4 Since Whidbey was denied notice and opportunity to be heard on this matter, interlocutory review will prevent substantial prejudice to Whidbey. In Order 04, the ALJ concluded that Whidbey did not negotiate in good faith and ordered briefing on the sanction to be applied to Whidbey. If Whidbey must continue to follow a procedure that is in violation of due process rights, that procedure creates substantial prejudice to Whidbey that would not be remedied by post-hearing review. Moreover, to the extent, if any, that the ALJ may be called upon to resolve disagreements regarding the provisions to be included within the contemplated interconnection agreement that is the subject of the arbitration, the ALJ's determination that Whidbey has violated a duty to negotiate in good faith cannot help but affect the ALJ's resolution of contractual issues that are the subject of this arbitration proceeding.[3]

5 Further, given that the ALJ contemplates briefing on the sanction to be imposed (although no hearing has been held), interlocutory review will save the Commission and the parties substantial effort and expense.

6 Further, the fact that Whidbey's due process rights have been violated outweigh the costs in time and delay of providing interlocutory review.

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[2] Whidbey believes that the ALJ's decisions in Order 04 are erroneous in other respects as well, but believes that review of those aspects of Order 04 can await review if they remain relevant and are not modified prior to entry of a final order in this proceeding.

[3] Concerning this possibility, Whidbey is very concerned about the hostile attitude expressed by the ALJ in his quote to Hamlet in Footnote 5 of Order 04 that Whidbey "doth protest too much."

III. THE ACTIONS OF THE ALJ VIOLATE WHIDBEY'S RIGHTS TO DUE PROCESS

7 The matter that had been submitted to the ALJ was the determination of three threshold issues. Order 04 describes these three threshold issues in Paragraphs 3 through 7. As described in Paragraph 7 of Order 04, the only issues that were briefed are the three threshold issues. Those issues are as follows:

> 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?
>
> 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?
>
> 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)?[4]

The three threshold issues do not include the question of whether or not Whidbey has violated any obligation to negotiate in good faith.

8 Whidbey was not given notice that the question of whether or not Whidbey had negotiated in good faith was an issue to be determined by the ALJ along with the threshold issues. Whidbey was not given an opportunity to present evidence on this topic. Whidbey was not given the opportunity to cross-examine or challenge any evidence that Sprint might present on this question.[5] Whidbey was not given an opportunity to brief the

[4] Order 04 at Paragraphs 4-6.

[5] Whidbey is adamant that if it had been given the opportunity to present evidence, Whidbey would have clearly demonstrated that it had not violated an obligation to negotiate in good faith.

law on this question. Instead, the ALJ usurped the fundamental rights of due process and decided a significant and distinct issue that was not before the ALJ to decide.

9 The ALJ admits as much in Paragraph 39 of Order 04 when the ALJ states as follows:

> 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.

This statement is amazing in the context of due process rights. It is true that Sprint's Petition raised allegations that Whidbey had failed to negotiate in good faith.[6] However, both Sprint's Petition and Whidbey's Answer raised a number of issues. None of the issues raised by Sprint's Petition and Whidbey's Answer were before the ALJ for decision, except the limited and defined "threshold issues." In fact, Sprint did not file a motion asking for a determination that Whidbey failed to negotiate in good faith. It is not for the ALJ to decide *sua sponte* issues in the pleadings (i.e., Sprint's Petition and Whidbey's Answer).

10 As pointed out above, Whidbey has had no opportunity to present evidence on this issue of the duty of good faith negotiations. Whidbey has not had an opportunity to cross-examine any witnesses on this issue. Whidbey has not had an opportunity to present briefing on this issue. Instead, the ALJ arbitrarily concludes in Paragraphs 41 and 42 of Order 04 that Whidbey has violated its obligation to negotiate in good faith.

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[6] Whidbey's Answer to Sprint's Petition raised the issue of whether Sprint violated its duty to negotiate in good faith, in part at least, by failing to provide information on the threshold issues, information Sprint refused to provide until December and only when directed by the ALJ to do so. Whidbey's Answer at Paragraph 32. The ALJ conveniently ignores this fact. Nor does the ALJ explain why he takes up the issue from Sprint's Petition and not the reciprocal issue.

11 The due process issues that are raised by this Petition are matters of black letter law. Under the Fifth Amendment to the U.S. Constitution, "No person shall...be deprived of life, liberty, or property, without due process of law." This protection was applied to actions by state governments by the Fourteenth Amendment: "[n]or shall any State deprive any person of life, liberty, or property without due process of law."

12 These protections are incorporated into Article I, Section 3 of the Washington State Constitution: "No person shall be deprived of life, liberty, or property without due process of law." The state provision and the federal provisions are viewed as co-extensive. Sherman v. State, 128 Wn.2d 164, 905 P.2d 355 (1995).

13 In this case, the ALJ made a determination that Whidbey violated "its" obligation to negotiate in good faith.[7] That conclusion is damaging to Whidbey's standing and reputation, and may have collateral consequences to Whidbey's outstanding loan covenants and contractual obligations to conduct its operations in compliance with all applicable law. Accordingly, the determination regarding violation of an obligation to negotiate in good faith cannot be made without following the requirements of due process. Further, the ALJ is contemplating that sanctions be imposed against Whidbey, presumably some sort of monetary sanction. That would be a clear deprivation of property.

14 While it is black letter law that the several requisites for due process may vary under the circumstances, the basic element is that a person's protected rights may not be

[7] To find the violations of 47 C.F.R. §51.301(c) which the ALJ did, this included, by necessity, a conclusion that Whidbey had a statutory obligation to negotiate under Section 251(c)(1) and Section 252. This issue is addressed in Section VII of this Petition, below.

deprived unless preceded by notice and opportunity for hearing appropriate to the nature of the case. Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 532, 105 S. Ct. 1487, 84 L. Ed. 2d 494 (1985).

15 The United States Supreme Court has adopted a three prong test in Mathews v. Eldridge, 424 U.S. 319, 96 S. Ct. 893, 47 L. Ed. 2d 18 (1976). This test has been adopted for use in Washington by our State Supreme Court. Ritter v. Board of Commissioners of Adams County Hospital Dist. No. 1, 96 Wn.2d 503, 637 P.2d 940 (1981). This test balances the private interest that will be affected by the official action, the risk of erroneous determination through the procedures used, the probable value, if any, of additional or substitute procedural safeguards and the government interest including the function involved. Also to be considered are the fiscal and administrative burdens that the additional or substitute procedural requirements would entail.

16 This proceeding is an arbitration before the Commission. No hearing was provided. No notice that the issue of negotiating in good faith was to be considered was provided. No opportunity to present evidence was provided. No opportunity to cross-examine or rebut the evidence or inferences relied on by the ALJ was provided.[8] The interest that is involved is Whidbey's reputation and, potentially, its monetary resources. With no hearing used at all by the ALJ, the risk of erroneous deprivation is very high. Therefore, use of the adjudicative proceedings that would seem to be required have a high value. Because the government's interest in this case is absent since it is acting as an

[8] No one even knows what evidence, if any, the ALJ relied upon since he fails to identify any particular evidence in the record. The only item identified by the ALJ is the ALJ's blatant misstatement of Whidbey's position on registration by Millennium.

arbitrator, the additional fiscal and administrative burdens of substitute or additional procedural requirements must be viewed as outweighing such interest. The use of an adjudicative proceeding is required before a finding and conclusion can be made concerning the extent, if any, to which Whidbey is subject to a Section 251(c)(1) obligation to negotiate in good faith and, if so, the extent, if any, to which Whidbey has violated that obligation.

IV. THE ARBITRATOR IS IN ERROR THAT "THE RECORD IS SUFFICIENTLY COMPLETE" ON THE ISSUE OF NEGOTIATION IN GOOD FAITH

17 In Paragraph 39 of Order 04, the ALJ states "The record is sufficiently complete that the Arbitrator chooses to begin addressing the matter [negotiation in good faith] at this time." There are two problems with this statement. First, the Arbitrator does not identify the record to which he is referring. The only possible record before the ALJ is the lists of potential exhibits that the parties have identified. Those exhibits have yet to be offered, an opportunity to object to admission has yet to be provided, and those exhibits are not in evidence. In addition, those exhibits have not been submitted with accompanying testimony. That testimony has not been subject to cross-examination. There is, in fact, nothing in the record to support the Arbitrator's decision. That is

because no record exists on the issue of negotiation in good faith.[9]

18 The second problem, of course, is that the Arbitrator independently and without a request to do so chose "to begin addressing" the matter. There was nothing before the Arbitrator for the Arbitrator to address on the issue of whether a violation of the obligation to negotiate in good faith occurred.

V. THE ALJ'S DETERMINATION IS CONTRARY TO THE REQUIREMENTS OF 47 C.F.R. §51.301(c)

19 The Arbitrator purports to find that Whidbey has violated its obligation to negotiate in good faith under 47 C.F.R. §51.301(c). Even if that section were to be applicable to Whidbey,[10] that section is predicated on the requirement that the action

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[9] In an apparent effort to fill this void, the Arbitrator speculates that Whidbey might have been disingenuous (Order 04, Paragraph 18): "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." However, it appears that this speculation itself is based upon a fundamental misreading by the ALJ of the relevant statute, RCW 80.36.350. That statute provides, in relevant part, "Each telecommunications company not operating under tariff in Washington on January 1, 1985, shall register with the commission before beginning operations in this state." (Emphasis added.) In direct contrast to the statute, the ALJ concludes in Conclusion of Law 2 (Paragraph 52), "Under RCW 80.36.350, Millennium Cable need not be registered with the Commission prior to beginning operations in Washington." (Emphasis added.)

The Arbitrator also concludes, contrary to what is shown by the potential exhibits that accompanied Sprint's Petition and Whidbey's Response to the Petition, that Whidbey placed "hurdle after hurdle" in front of Sprint (Order 04, Paragraph 42). The issues raised by Whidbey were all subsumed in the issues that Whidbey raised with Sprint at the outset and were presented to Sprint by Whidbey as early in its communications with Sprint as Sprint's disclosures to Whidbey would permit.

This is precisely why due process requires a hearing: so that speculation and misconstruction of facts and law have a much lower probability of occurring.

[10] 47 C.F.R. §51.301 implements Section 251 of the Communications Act of 1934, as amended, In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, Interconnection Between Local Exchange Carriers and Commercial Mobile Radio Service Providers, CC Docket Nos. 96-98 and 95-185, First Report and Order, FCC 96-325 (released August 8, 1996) at Paragraphs 148-154, from which Whidbey is exempt by reason of its "rural exemption" under Section 251(f)(1) of the Act. Accordingly, 47 C.F.R. §51.301(c), upon which the ALJ relies, is inapplicable to Whidbey.

constituting the violation of the duty to negotiate in good faith must be "proven."[11] Under due process standards, for a fact to be "proven" or a violation to be "proven" there must be notice and an opportunity to be heard. It is not permissible to simply draw a broad conclusion that a violation has occurred without notice and an opportunity to be heard and call for briefing on the imposition of sanctions.[12]

20 To prove a fact or prove a violation of law, there must be a hearing, there must be an opportunity to present evidence and to cross examine witnesses. None of that has occurred in this case. The predicate to finding a violation under 47 C.F.R. §51.301(c) has not taken place. The ALJ's determination is both premature and precipitous.

VI. THE ALJ MISSTATES WHIDBEY'S POSITION AS THE BASIS FOR THE ALJ'S DECISION

21 The ALJ makes a determination that Whidbey "demanded that Millennium register with the Commission before Whidbey be required to enter into interconnection negotiation with Sprint."[13] This is a blatant misstatement of Whidbey's position. Whidbey's position on this issue has always been straightforward: Sprint should demonstrate that the operations under the contemplated ICA would not be unlawful.[14] Sprint would easily have responded. Sprint could have either (1) provided support as to why Millennium is not required to be registered under Washington law or (2) provided an assurance that at the

[11] 47 C.F.R. §51.301(c) reads as follows: If proven to the Commission, an appropriate state commission, or a court of competent jurisdiction, the following actions or practices, among others, violate the duty to negotiate in good faith:.... (Emphasis added.)
[12] See, analysis at Paragraphs 11-16, above.
[13] Order 04 at Paragraph 53.
[14] See, e.g., Petition, Exhibit I, Page 4 ("...Whidbey does not feel it can move forward with steps looking toward effecting such interconnection – or the exchange of local traffic contemplated by such interconnection – unless and until there is adequate evidence that the service Sprint intends to facilitate by the requested interconnection and contemplated traffic exchange is not unlawful.")

time operations occur under a negotiated ICA, Millennium will be registered. Whidbey has never demanded that Millennium be registered as a precondition to negotiations.

22 The ALJ goes beyond misstating Whidbey's position. The ALJ speculates Whidbey's concern as "perhaps a disingenuous step to delay...."[15] This attribution of motive by the ALJ is made without witnesses having appeared before the ALJ. The ALJ has had no opportunity to hear the witnesses testify. The ALJ has had no opportunity to judge the credibility of any such witnesses. To ascribe motives without testimony on the record goes too far afield.[16]

23 In addition, in Footnote 5 of Order 4, the ALJ contends that Whidbey's statements that it had not conditioned negotiations on the requesting telecommunications carrier first obtaining state certification is analogous to the Hamlet quote of "protesting too much." The ALJ states that this "protest" forced the ALJ to raise the issue of sanctions. The ALJ's statement is a complete non sequitur. The ALJ's premise is a blatant misreading of Whidbey's position. The ALJ's "justification" is a blatant disregard of Whidbey's briefing. In fact, it is a bootstrap approach that the ALJ uses to address issues that are not before him.

24 To place the ALJ's mischaracterization of Whidbey's position in context, 47 C.F.R. §51.301(c)(4) states specifically that it is a violation of the duty to negotiate in good faith to condition "negotiation on a requesting telecommunications carrier first obtain state certifications." (Emphasis added.) As the ALJ recognizes, Whidbey has

[15] Order 04 at Paragraph 18.
[16] Ironically, while the ALJ speculates as to Whidbey's motives, the ALJ also dismisses Whidbey's concerns regarding the consequences of potential noncompliance with state law as "pure speculation."

never demanded that Sprint, as the requesting telecommunications carrier, obtain additional state certifications. Order 04 at Paragraph 41. However, the ALJ goes on to strain the construction of the FCC's rule by saying that the demand (which never occurred) that Sprint's trading partner obtain registration equates to a violation of the specific language of 47 C.F.R. §51.301(c)(4).[17] That conclusion is false since it relies upon a position that Whidbey did not take. That conclusion is not supported in the record since there is no record. That conclusion is in error since it is contrary to the clear language of the FCC's regulation. That conclusion is in error in that the ALJ does not show how such a demand (if it had ever been made, which it had not) could be considered to be something that "equates" to demanding that Sprint, as the requesting carrier, obtain registration or certification.

25 The point is that the ALJ has mischaracterized the record in what appears to be an effort to shoehorn into place a violation that did not occur. The ALJ has also misread and misapplied 47 C.F.R. §51.301(c)(4).

26 Further, the ALJ's reliance on 47 C.F.R. §51.301(c)(6)[18] is not supported by the "record." Even assuming that there is some sort of record on the issue of whether a violation of the obligation to negotiate in good faith before the ALJ, which there is not, the ALJ misconstrues the proper application of 47 C.F.R. §51.301(c)(6). Essentially, what the ALJ holds is that questioning the legal basis for proceeding with an ICA constitutes "intentionally obstructing" or "intentionally delaying" negotiations. Under the

[17] Order 04 at Paragraph 41.
[18] 47 C.F.R. §51.301(c)(6) provides that it is a violation of the duty to negotiate in good faith by "[i]ntentionally obstructing or delaying negotiations or resolutions of disputes."

ALJ's theory, a party has only one choice – negotiate even if the negotiations are illegal or have an illegal purpose.

27 In addition, consider the temporal context of threshold issues raised by Whidbey. One of these issues is whether Sprint qualifies as a "telecommunications carrier" as defined in the Telecommunications Act of 1996 for purposes of Section 251 interconnection. It is entirely inconsistent with his conclusion that Whidbey violated its duty to negotiate in good faith for the ALJ to point to the fact that Sprint did not provide evidence that it would provide service to its trading party, Millennium, as a common carrier and thus qualify as a "telecommunications carrier" until it submitted the Declaration of James Burt.[19] The ALJ goes on to rely on the evidence presented in that declaration to support the ALJ's conclusion that Sprint qualifies as a telecommunications carrier. Since Mr. Burt's Declaration was not submitted until December 6, 2007, and this is the evidence the ALJ relies on to conclude Sprint demonstrated it qualifies as a telecommunications carrier, how can Whidbey be said to have engaged in intentional obstruction when Sprint refused to provide the evidence that it qualified as a telecommunications carrier until December 6, 2007? The ALJ has no support for his conclusion.

28 Another threshold issue that was raised by Whidbey concerns Sprint's ability to submit a bona fide request for local number portability. As it has developed, Sprint's request for LNP is on behalf of its trading partner, Millennium. It is manifest that the law was not clear as to the extent to which a competitive local exchange carrier may submit a

[19] Order 04 at Paragraph 23.

request for LNP on behalf of an interconnected VoIP provider. In fact, the law on that point was not clarified until the FCC issued its decision on November 8, 2007 – nearly six months after Sprint submitted its request to Whidbey and Whidbey questioned Sprint's eligibility to submit the request.[20] If it took an FCC order, issued in November, 2007 (after the date that Sprint sought arbitration in this matter), how can Whidbey be said to have created an intentional obstruction to negotiation? Again, even assuming arguendo there is some sort of record in this case on the issue at hand, the ALJ has no basis for his conclusion that Whidbey violated 47 C.F.R. §51.301(c)(6).

29 The FCC has determined that whether a party is engaged in good faith negotiations needs to be decided on a case-by-case basis in light of all the facts and circumstances underlying the negotiations. In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, Interconnection Between Local Exchange Carriers and Commercial Mobile Radio Service Providers, CC Docket Nos. 96-98 and 95-185, First Report and Order, FCC 96-325 (released August 8, 1996) at Paragraphs 150 and 154. This case-by-case process equates to using an adjudicative proceeding to develop a record.

VII. WHIDBEY HAS NO OBLIGATION TO ENTER INTO NEGOTIATIONS UNDER §251(c)(1) AND SECTION 252

30 Sprint's request for interconnection is limited to Sections 251(a) and (b) of the Telecommunications Act of 1996.[21] Sprint has not triggered any obligations under Section 251(c), which includes under Section 251(c)(1) the duty to negotiate in good faith in

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

accordance with Section 252. As at least two courts have determined, a rural telephone company has no obligation to negotiate if Section 251(c)(1) is not triggered. Sprint Communications Co. L.P. v. Public Utility Com'n of Texas, Slip Copy, 2006 WL 4872346 (W.D. Tex, 2006) (company holding a rural exemption is "exempt from §251(c)(1)'s duty to negotiate" and "is free to refuse to negotiate anything at all with Sprint unless and until the PUC lifts [company's] rural exemption").[22] Copy attached as Attachment 1. See, also, Consolidated Comm. Fort Bend v. Public Util. Com'n, 497 F.Supp.2d 836, 839 (W.D. Texas 2007) ("A company that qualifies as a rural ILEC is exempt from the duties described in Section 251(c) and is relieved of the duty to negotiate an interconnection agreement....").

31 As Whidbey has pointed out in this docket, Whidbey is entitled to the rural exemption under 47 U.S.C. §251(f).[23] However, Whidbey has stated that it was willing to enter into voluntary negotiations, subject to its rights as a rural telephone company, which includes the exemption from 251(c) obligations.[24] Thus, it is not legally correct for the ALJ to find a violation of 47 C.F.R. §301(c) where Section 251(c) is inapplicable.

VIII. THE ARBITRATION PROCEEDING IS NOT AN APPROPRIATE PROCEEDING IN WHICH TO CONSIDER THE QUESTION OF THE DUTY TO NEGOTIATE IN GOOD FAITH AND POSSIBLE SANCTIONS

32 The matter that is pending before the Commission is an arbitration. The Commission has defined an arbitration as not constituting an adjudication. WAC 480-07-

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[22] The District Court cites to Coserv. Ltd. Liab. Corp v. Southwestern Bell Tel. Co., 350 F.3d 482, 487 (5th Cir. 2003) holding that an ILEC is free to refuse to negotiate any issues other than those it has a specific duty to negotiate under the Act.

[23] Whidbey's Answer at Page 18, Footnote 11 and Whidbey's Brief on Threshold Issues at Page 3, Footnote 8.

[24] Ibid.

630(2). Since a determination of whether or not Whidbey has engaged in activities that constitute a violation of its obligation to negotiate in good faith affects the due process interests of Whidbey, such proceeding may only take place through an adjudication under the full procedural requirements of the Administrative Procedure Act contained in Chapter 34.05 RCW.

IX. THE ALJ'S DECISION IS ARBITRARY AND CAPRICIOUS, WITHOUT SUPPORT IN THE "RECORD" AND CONTRARY TO LAW

33 The ALJ did not follow the requirements for an adjudicative proceeding. The failure to follow the basic elements of due process is the very definition of arbitrary and capricious action.

34 As noted above, the Arbitrator has made this decision in the context of an arbitration which the Commission's rules define as not constituting an adjudicative proceeding. If the ALJ's decision had been made in the context of an adjudicative proceeding, it would clearly be without support in the "record" since there is no record. It would also be, for the reasons set forth above, contrary to law. In fact, the ALJ's decision would be subject to reversal under RCW 35.04.570(3)(a), (c), (d), (e) and (i).[25]

35 The ALJ followed an impermissible process to make determinations that affect Whidbey's liberty and property interests protected by the United States and Washington

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[25] RCW 35.04.570(3) provides in pertinent part that relief from an administrative order is appropriate when:

(a) The order, or the statute or rule on which the order is based, is in violation of constitutional provisions on its face or as applied;...

(c) The agency has engaged in unlawful procedure or decision-making process, or has failed to follow a prescribed procedure;

(d) The agency has erroneously interpreted or applied the law;

(e) The order is not supported by evidence that is substantial when viewed in light of the whole record...

(i) The order is arbitrary or capricious.

State Constitutions and otherwise protected by law. The ALJ has ordered further proceedings in the form of briefing as to sanctions. Those further proceedings are improper and should be set aside.

X. THE ARBITRATOR'S DETERMINATION IGNORES THE MORE CURRENT RELATIONSHIP BETWEEN THE PARTIES

36 The ALJ reaches a strange conclusion when he orders that effective January 24, 2008, Whidbey "must promptly enter into good faith negotiations with Sprint...." Order 04 at Paragraph 59. However, the ALJ was fully aware that Whidbey and Sprint have been conducting a series of voluntary negotiations for some months prior to that time. For the ALJ to make his determinations out of context and in seeming ignorance of what the parties have been doing and the progress of their negotiations defies comprehension. Indeed, the ALJ was informed on January 30, 2008, that the parties had reached full agreement and were working to prepare an execution copy of a fully negotiated agreement.

XI. WHIDBEY REQUESTS THAT THE ALJ HAVE NO PARTICIPATION IN THIS INTERLOCUTORY REVIEW

37 Whidbey is uncertain as to the Commission's practice for the inclusion or exclusion of the ALJ assigned to a matter when an interlocutory review in that matter is sought. Whidbey believes that involving the ALJ in consideration of this Petition would be a violation of Whidbey's due process rights and certainly raise issues related to whether the Doctrine of the Appearance of Fairness has been violated. See, Adjudications Under the APA by C. Robert Wallis, Section 9 of the Washington Administrative Law Practice Manual (2004 Ed.). As stated by Judge Wallis: "An administrative adjudication violates the Appearance of Fairness Doctrine if a reasonably prudent disinterested observer would

conclude that the parties did not obtain a fair, impartial, and neutral hearing." (Citing Deatheridge v. Board of Psychology, 85 Wn. App. 434, 932 P.2d 1267, rev. on other grounds, 134 Wn.2d 131, 948 P.2d 828 (1997)).[26] Therefore, Whidbey respectfully requests that the ALJ have no participation in the consideration of this Petition.

XII. CONCLUSION

38 Whidbey respectfully requests that the Commission grant interlocutory review and vacate the determination of the ALJ in Order 04 that Whidbey has engaged in activity which constitutes a violation of an obligation to negotiate in good faith. This necessarily includes vacating the ALJ's call for briefing on sanctions to be applied to Whidbey.

Respectfully submitted this 1st day of February, 2008.

WHIDBEY TELEPHONE COMPANY

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[26] This appears at Page 9-7 of Section 9 of the Washington Administrative Law Practice Manual.

ATTACHMENT 1

Sprint Communications Co. L.P. v. Public Utility Com'n of Tex.
W.D.Tex.,2006.
Only the Westlaw citation is currently available.
United States District Court,W.D. Texas,Austin Division.
SPRINT COMMUNICATIONS COMPANY L.P., Plaintiff,
v.
The PUBLIC UTILITY COMMISSION OF TEXAS; Paul Hudson, Commissioner of the Public Utility Commission of Texas; Julie Parsley, Commissioner of the Public Utility Commission of Texas; Barry Smitherman, Commissioner of the Public Utility Commission of Texas; and Brazos Telephone Cooperative, Inc., Defendants.
No. A-06-CA-065-SS.

Aug. 14, 2006.

David P. Murray, Patrick Sullivan, Willkie, Farr & Gallagher, LLP, Washington, DC, James W. Checkley, Jr., William B. Steele, III, Locke Liddell & Sapp LLP, Austin, TX, Monica M. Barone, Spring Nextel, Overland Park, KS, for Plaintiff.
Elizabeth R.B. Sterling, Suzanne Antley, Office of the Attorney General, Brook Bennett Brown, Lin Hughes, McGinnis, Lochridge & Kilgore, Austin, TX, for Defendants.

SAM SPARKS, United States District Judge.
*1 BE IT REMEMBERED on the 15th day of June 2006, the Court held a hearing in the above-styled cause, and the parties appeared through counsel. Before the Court were Brazos Telecommunications, Inc.'s ("Brazos") Motion to Dismiss [# 20], Sprint Communications Company L.P.'s ("Sprint") Response [# 23], Brazos's Reply [# 29], the Public Utility Commission's ("PUC") Motion for Summary Judgment [# 27], Sprint's Response [# 33], Brazos's Motion for Summary Judgment [# 31], Sprint's Response [# 33], Sprint's Motion for Partial Summary Judgment [# 21], the PUC's Response [# 28], Brazos's Response [# 30], and Sprint's reply [# 33]. Having considered the motions, responses, and replies, the arguments of counsel at the hearing, the relevant law, and the case file as a whole, the Court now enters the following opinion and orders.

Background

This case involves a dispute between two telecommunications companies, Sprint Communications Company L.P. ("Sprint") and Brazos Telecommunications, Inc. ("Brazos"), and the Public Utility Commission of Texas ("the PUC") over the interconnection and arbitration requirements of the Telecommunications Act of 1996 ("the Act"). In order to understand either party's position with respect to the interconnection and arbitration provisions of the Act, it is necessary to begin with a discussion of the context in which those provisions and the rest of the Act arose.

Until the time of the Act's passage, local telephone service was treated as a natural monopoly in the United States, with individual states granting franchises to local exchange carriers ("LECs"), which acted as the exclusive service providers in the regions they served. *AT & T v. Iowa Utils. Bd.*, 525 U.S. 366, 371 (1999). The 1996 Act fundamentally altered the nature of the market by restructuring the law to encourage the development and growth of competitive local exchange carriers ("CLECs"), which now compete with the incumbent local exchange carriers ("ILECs") in the provision of local telephone services. *Id.* The Act achieved its goal of increasing market competition by imposing a number of duties upon ILECs, the most significant of which is the ILEC's duty to share its network with the CLECs. *Id.*;47 U.S.C. § 251. Under the Act's requirements, when a CLEC seeks to gain access to the ILEC's network, it may negotiate an "interconnection agreement" directly with the ILEC, or if private negotiations fail, either party may seek arbitration by the state commission charged with regulating local telephone service, which in Texas is the PUC. § 252(a), (b). In either case, the interconnection agreement must ultimately

be publicly filed with the state commission for final approval. § 252(e).

Sprint brings this action for a declaration of the rights and duties of the parties under §§ 251, 252, and 253 of the Telecommunications Act of 1996. A brief summary of the procedural events leading to this case is in order. On November 16, 2004, Sprint requested interconnection with Brazos, and Brazos responded that, as a rural telephone company, it was not obligated to negotiate interconnection with Sprint.[FN1] On April 25, 2005, Sprint filed a petition for compulsory arbitration under § 252(b)(1) with the PUC, and on May 13, 2005, Brazos filed a motion to dismiss Sprint's arbitration petition, claiming that Brazos was exempt from the interconnection obligations set forth in Sprint's petition because Brazos was a rural telephone company under § 251(f)(1)(A). On June 14, 2005, the PUC granted Brazos's motion to dismiss, finding that Sprint's request was governed by § 251(c), a provision from which Brazos is exempt as a rural telephone company. Sprint appealed this order, and claimed that it was only seeking interconnection under § 251(a) & (b), provisions from which Brazos is not exempt. Then, on August 23, 2005, the PUC referred the case to the Texas State Office of Administrative Hearings for a hearing to develop the evidentiary record. Finally, on December 2, 2005, the PUC denied Sprint's appeal of the PUC's order dismissing Sprint's petition to arbitrate an interconnection agreement between Sprint and Brazos, reasoning that Brazos was exempt from the type of interconnection agreement sought by Sprint unless and until Sprint successfully petitioned to lift Brazos's rural exemption. PUC Order Denying Sprint's Appeal at 3.

> FN1. The Act allows carriers to establish interconnection agreements voluntarily; but if they are unable to do so, either carrier may petition the state commission to arbitrate an interconnection agreement. 47 U.S.C. § 252.

***2** Sprint asserts the PUC violated 47 U.S.C. §§ 251(a), 251(b), 252, and 253(a) and engaged in arbitrary and capricious decisionmaking. Sprint further asserts that Brazos violated §§ 251(a) and 251(b). Sprint requests the following relief: (1) declare that § 251(a) imposes a duty on Brazos to interconnect for the mutual exchange of traffic; (2) declare that Brazos has a duty to provide Sprint with number portability and dialing parity and to establish reciprocal compensation under § 251(b); (3) declare that the PUC's final order violated §§ 251(a), 251(b), 252, and 253; (4) declare the PUC's findings arbitrary and capricious; (5) direct the PUC to arbitrate and approve an interconnection agreement; and (6) declare that Brazos violated its duties and award Sprint damages for Brazos's failure to interconnect.

Brazos has filed a motion to dismiss and a motion for summary judgment. The PUC has filed a motion for summary judgment, and Sprint has filed a motion for partial summary judgment.

Analysis

I. Brazos' Motion to Dismiss

Brazos moves to dismiss Sprint's complaint for lack of subject matter jurisdiction. Brazos claims that the PUC order at issue is not a final determination of an interconnection agreement over which this Court has jurisdiction. The PUC's order finds that Brazos is exempt from the type of interconnection Sprint seeks; therefore, Brazos contends Sprint must first file a petition to remove Brazos's rural exemption before any final, appealable determination of the PUC can issue. Brazos contends that if Sprint were to file a petition to remove Brazos's rural exemption, the PUC's decision to remove the exemption in whole or in part might moot some or all of the relief Sprint seeks, and, alternatively, if the PUC were to uphold Brazos's rural exemption, that decision would be appealable.

Section 252(e)(6) of the Act provides: "In any case in which a State commission makes a *determination* under this section, any party aggrieved by such determination may bring an action in an appropriate Federal district court to determine whether the agreement or statement meets the requirements of

section 251 of this title and this section."[FN2] 47 U.S.C. § 252(e)(6) (emphasis added). Brazos asserts this Court has no jurisdiction over this case because the PUC's order is interlocutory and is not a "determination" as defined by § 252(e)(6). Brazos contends that under § 252(e)(6) federal district courts may only review state commission decisions approving or enforcing an interconnection agreement.

> FN2.Section 251 discusses the general duties and obligations of telecommunications carriers, and it will be discussed below in greater detail. 47 U.S.C. § 251.

Sprint takes the position that the PUC made a final determination subject to this Court's review under § 252(e)(6). In *Southwestern Bell Telephone Co. v. Public Utility Commission of Texas,* 208 F.3d 475 (5th Cir.2000), the Fifth Circuit declined to "read section 252(e)(6) so narrowly as to limit its grant of federal district court jurisdiction to review decision of state commissions only to those decisions that either approve or reject interconnection agreements."*Id.* at 480-81."[F]ederal court jurisdiction extends to review of state commission rulings on complaints pertaining to interconnection agreements and ... such jurisdiction is not restricted to mere approval or rejection of such agreements."*Id.* at 481.*Accord AT & T Corp. v. Iowa Utils. Bd.,* 525 U.S. 366, 378 n. 6 (recognizing that "if the federal courts believe a state commission is not regulating in accordance with federal policy they may bring it to heel."). Further, a district court has sustained subject matter jurisdiction under § 252(e)(6) to review a state commission's decision dismissing a portion of a petition for arbitration.*MCI Telecomms. Corp. v. BellSouth Telcomms., Inc.,* 112 F.Supp.2d 1286, 1297-98 (N.D.Fla.2000), *aff'd,*298 F.3d 1269 (11th Cir.2002) (remanding to the state commission for arbitration of the disputed liquidated damages provision as part of the proposed interconnection agreement).

*3 The PUC's counsel admitted in open court that the PUC believes this Court has jurisdiction over this case. *See also* PUC's Amended Answer at ¶ 1 (filed March 10, 2006). This Court agrees with Sprint's position that the PUC's Order Denying Sprint's Appeal, dated December 2, 2005, rendered a final determination on the issue of whether the rural exemption relieves Brazos from any obligation to negotiate and arbitrate an interconnection agreement with Sprint; therefore, the Court has subject matter jurisdiction to review the PUC's interpretation of the Act and Brazos' motion is denied.

II. Summary Judgment Motions

A. Standard of Review

In evaluating whether the PUC's interpretation of the Telecommunications Act and the FCC's regulations are correct, this Court applies a de novo standard of review. *Southwestern Bell Tel. Co. v. Pub. Util. Comm'n of Texas,* 208 F.3d 475, 482 (5th Cir.2000). The PUC's resolution of all other issues is reviewed under the "arbitrary and capricious" standard. *Id.* The parties agree that summary judgment is appropriate in this case because there are no genuine issues of material fact and this case may be wholly decided as a matter of law. Fed.R.Civ.P. 56(c); *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 247-248 (1986).

B. The PUC's Motion for Summary Judgment

The PUC moves for summary judgment and asks this Court to affirm the PUC's dismissal of Sprint's request for compulsory arbitration and to deny Sprint all relief it seeks. The PUC contends that this case presents only one question: whether or not Brazos's rural exemption must be removed before Brazos can be compelled to participate in compulsory arbitration with Sprint?

All parties agree, for purposes of this appeal, that Brazos is a rural telephone company as defined by 47 U.S.C. § 153(37) and a "local exchange carrier with fewer than 2 percent of the Nation's subscriber lines" as defined by 47 U.S.C. § 251(f)(2).

The Act imposes varying obligations on telecommunications companies under the subsections of section 251, "[s]ection 251(a) imposes relatively

limited obligations on all telecommunications carriers; section 251(b) imposes moderate duties on local exchange carriers; and section 251(c) imposes more stringent obligation on ILECs. Thus, section 251 of the Act create[s] a three-tiered hierarchy of escalating obligations based on the type of carrier involved."*Total Tecomms. Servs., Inc. & Atlas Tel. Co., Inc. v. AT & T Corp.*, FCC 01-84, File No. E-97-003, Memorandum Op. & Order at ¶ 25.

Section 251(a)(1) imposes a universal duty on all "telecommunications carriers" to "interconnect directly or indirectly with the facilities and equipment of other telecommunications carriers."47 U.S.C. § 251(a)(1). "Interconnection" is "the linking of two networks for the mutual exchange of traffic. This term does not include the transport and termination of traffic."47 C.F.R. § 51.5 (2005).Section 251(b) imposes certain duties on "all local exchange carriers" which include: resale, number portability, dialing parity, access to rights-of-way, and reciprocal compensation. 47 U.S.C. § 251(b)(1)-(5).Section 251(c) imposes additional duties on "incumbent local exchange carriers" including a duty to negotiate, interconnection duties, unbundled access, resale, notice of changes, and collocation. 47 U.S.C. § 251(c)(1)-(6).

*4 Section 252 sets forth the procedures by which ILECs may fulfill the duties imposed by § 251. An ILEC may reach an agreement with a CLEC to fulfill its § 251 duties either through voluntary negotiations or, should negotiations fail, through arbitration before the State commission. Section 252(a)(1) describes the voluntary negotiations procedure: "Upon receiving a request for interconnection, services, or network elements pursuant to section 251 of this title, an incumbent local exchange carrier may negotiate and enter into a binding agreement with the requesting telecommunications carrier or carriers without regard to the standards set forth in subsections (b) and (c) of section 251 of this title."47 U.S.C. § 252(a)(1). Should voluntary negotiations not result in a complete interconnection agreement, "the carrier or any other party to the negotiation may petition a State commission to arbitrate any open issues."*Id.* at § 252(b)(1).

Here, Brazos is an ILEC, but also qualifies as a rural telephone company under the Act. Sprint is a local exchange carrier, but not an ILEC. As discussed above, Sprint asked Brazos to negotiate an interconnection agreement, and Brazos responded that, as a rural telephone company, it was not required to negotiate such an agreement. The PUC essentially agreed with Brazos and decided it could not consider Sprint's petition for arbitration until Brazos's rural exemption was terminated.

Sprint takes the position that the PUC was obligated to require Brazos to comply with its statutory duties under § 251(a) and (b), to which the rural exemption does not apply, instead of merely dismissing Sprint's Petition for Arbitration. 47 U.S.C. § 252(b)(4)(C) ("The State commission shall resolve each issue set forth in the petition ... by imposing appropriate conditions as required to implement [the requirements of § 251]."). However, as discussed in detail below, Sprint's interpretation conflicts with the plain language of the Act. Because Brazos was exempt from the duty to negotiate any interconnection agreement with Sprint, the PUC had no authority to arbitrate any agreement between Sprint and Brazos.

Section 251(f)(1), which sets forth the rural exemption, states: "[s]ubsection (c) of this section shall not apply to a rural telephone company until (I) such company has received a bona fide request for interconnection, services, or network elements, and (ii) the State commission determines (under subparagraph (B)) that such request is not unduly economically burdensome, is technically feasible, and is consistent with section 254 of this title...."47 U.S.C. § 251(f)(1)(A).

Where the parties disagree here is on whether the rural exemption shields Brazos from the duty to negotiate an interconnection agreement with regard to duties arising under § 251(a) and (b). By its plain language, the "rural exemption" only applies to the duties set forth in § 251(c), the third tier of interconnection duties. However, the "duty to negotiate" the particular terms and conditions of agreements is specifically set forth in § 251(c)(1), [FN3] and

Brazos is exempt from this duty as a rural telephone company. Therefore, Brazos has no duty to negotiate any interconnection agreement with Sprint unless and until its rural exemption is lifted.

> FN3."In addition to the duties contained in subsection (b) of this section, each incumbent local exchange carrier has the following duties: (1) Duty to negotiate-The duty to negotiate in good faith in accordance with section 252 of this title the particular terms and conditions of agreements to fulfill the duties described in paragraphs (1) through (5) of subsection (b) of this section and this subsection. The requesting telecommunications carrier also has the duty to negotiate in good faith the terms and conditions of such agreements."47 U.S.C. § 251(c)(1).

*5 "An ILEC is clearly free to refuse to negotiate any issues other than those it has a duty to negotiate under the Act when a CLEC requests negotiation pursuant to §§ 251 and 252."*Coserv Ltd. Liab. Corp. v. Southwestern Bell Tel. Co.*, 350 F.3d 482, 487 (5th Cir.2003). Here, because Brazos is a rural telephone company exempt from § 251(c)(1)'s duty to negotiate, Brazos is free to refuse to negotiate anything at all with Sprint unless and until the PUC lifts Brazos's rural exemption. The policy evinced in § 251(f) is that rural telephone companies should be shielded from burdensome interconnection requests until the PUC has screened such requests. This policy could be too easily thwarted if a CLEC, such as Sprint, could evade PUC screening by denominating its request for interconnection as one solely under § 251(a) and (b). In this situation, where Brazos has refused to negotiate with Sprint, there are no "open issues" for the PUC to arbitrate under § 252.

Here, Brazos had no duty to negotiate or to submit to arbitration of an agreement with Sprint under § 252. The Fifth Circuit has expressly stated that "[t]he party petitioning for arbitration may not use the compulsory arbitration provision to obtain arbitration of issues that were not the subject of negotiations."*Coserv*, 350 F.3d at 487;*see also U.S. W. Commc'n, Inc. v. Minnesota Pub. Utils. Comm'n*, 55 F.Supp.2d 968 (D.Minn.1999) (holding that "open issues" are limited to those that were the subject of voluntary negotiations).

The Court further notes that § 251(a) and (b) say nothing at all about "agreements," "negotiations," or "arbitration." 47 U.S.C. § 251(a) and (b). Although there are duties established by § 251(a) and (b), and such duties apply to Brazos, the Court cannot find any language in the Act indicating that these duties independently give rise to a duty to negotiate or to arbitrate.[FN4] Therefore, the Court concludes that the PUC made the proper legal determination when it determined that it could not compel Brazos to arbitrate an interconnection agreement with Sprint with respect to Brazos's duties under § 251(a) and (b) of the Act.

> FN4. The only duty to negotiate arises under § 251(c), a duty from which Brazos is exempt as a rural telephone company.

For the reasons set forth above, the Court grants the PUC's and Brazos's motions for summary judgment FN5 and denies Sprint's motion for partial summary judgment. The Court further rejects Sprint's claim that the PUC's order violates 47 U.S.C. § 253. Because the Court has already upheld the PUC's decision, Sprint's claim that the PUC created a legal requirement prohibiting entry into Texas rural telecommunications markets falls flat.

> FN5. Brazos's Motion for Summary Judgment [# 31] is very similar to the PUC's motion and seeks the same result: denial of Sprint's motion for partial summary judgment and affirmance of the PUC's order. Therefore, the Court grants Brazos's motion for the same reasons it grants the PUC's motion.

Conclusion

In accordance with the foregoing:

IT IS ORDERED that Brazos's Motion to Dismiss

[# 20] is DENIED;

IT IS FURTHER ORDERED that the PUC's Motion for Summary Judgment [# 27] and Brazos's Motion for Summary Judgment [# 31] are GRANTED, and the PUC's dismissal of Sprint's petition for compulsory arbitration is AFFIRMED;

IT IS FURTHER ORDERED that Sprint's Motion for Partial Summary Judgment [# 21] is DENIED; and

*6 IT IS FINALLY ORDERED that all other pending motions are DISMISSED AS MOOT.

W.D.Tex.,2006.
Sprint Communications Co. L.P. v. Public Utility Com'n of Tex.
Slip Copy, 2006 WL 4872346 (W.D.Tex.)

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