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 SPRINT COMMUNICATIONS COMPANY L.P.'S OPPOSITION TO PETITION FOR INTERLOCUTORY REVIEW

I. INTRODUCTION

1 Sprint Communications Company, L.P. ("Sprint") filed a Petition for Arbitration pursuant to 47 U.S.C. § 252(b) of the Telecommunications Act of 1996 (the "Act")[1] on October 17, 2007, out of necessity, because Whidbey Telephone Company ("Whidbey") refused to negotiate an interconnection agreement ("ICA") claiming that "threshold issues" needed to first be resolved. Whidbey resisted the Petition by filing a Motion to Dismiss on November 2, 2007 which was denied on November 30, 2007 in Order 02. Thereafter, the parties engaged in a series of negotiations over December 2007 and January 2008. During this time period, the parties briefed Whidbey's "threshold issues" and the Administrative Law Judge ("ALJ") reviewed them. The ALJ issued Order 04 on January 24, 2008 finding Whidbey's "threshold issues" to be completely without merit. In fact, the ALJ found the fact that Whidbey raised these baseless "threshold issues" in the first place, and how it did so, violated Whidbey's duty to negotiate in good faith under 47 C.F.R. § 301.

2 Shortly after issuance of Order 04, Sprint and Whidbey reached final agreement on an ICA. They will file this negotiated agreement with the Commission for approval under WAC 480-07-640(2)(a)(i). While achieving this ICA was at issue in Sprint's Petition, Sprint also asked the Commission, in its Petition, to sanction Whidbey for failure to negotiate in good

[1] Codified at 47 U.S.C. § 251, *et seq.*

faith. Because Whidbey would not negotiate until after Sprint was forced to petition this Commission for assistance, based upon unreasonable grounds, Whidbey violated its duty to negotiate in good faith. Therefore, while Sprint no longer requires the assistance of the Commission to obtain an ICA, Sprint continues to claim that Whidbey should be sanctioned for its failure to negotiate in good faith.

3 The issue of proper sanctions for Whidbey's failure to negotiate in good faith remains the sole, unresolved issue in this docket. Order 04 properly found that Whidbey failed to negotiate with Sprint in good faith and requested further briefing on appropriate sanctions against Whidbey. Whidbey's Petition for Interlocutory Review simply asks the Commission to vacate that finding. (Petition page 17). Sprint opposes this Petition for several reasons. First, as explained herein, the record and the law fully support the ALJ's finding. Second, as a matter of public policy Whidbey should be sanctioned for its obstreperous conduct, which was designed to impede the entry of real competition in Whidbey's serving areas. Congress and the Federal Communications Commission ("FCC") intended to provide state commissions with authority to police this sort of conduct by imposing a duty to negotiate in good faith upon carriers and providing the Commission the power to issue sanctions if such duty is violated. Absolving Whidbey would only reward those companies who would thwart federal and state pro-competitive policies. The conduct of Whidbey at every step since it received Sprint's request for interconnection shows a deliberate pattern of raising baseless roadblocks to prevent Sprint from competing with it. Now, by virtue of its Petition Whidbey wants to avoid accountability for its deliberate strategy, which did not succeed. Whidbey's conduct in this case is exactly the type of conduct that should be sanctioned.

II. ARGUMENT

A. Whidbey Is Not Entitled To Interlocutory Review.

4 Order 04 is not an interlocutory order within the meaning of WAC 480-07-810(1) which distinguishes interlocutory orders from initial orders. That rule states "examples of interlocutory orders are orders concerning a party's participation in the proceeding, orders concerning discovery, and orders that related to proposed evidence." Order 04 is an initial order because it is dispositive on one of the issues raised by the Sprint Petition; namely, whether Whidbey violated its duty to negotiate in good faith. While Whidbey is entitled to review of this initial Order, Whidbey's Petition does not satisfy the criteria for such review under WAC 480-07-825(3). Instead, Whidbey tries, but fails, to satisfy the criteria of WAC 480-07-810(2) which applies to interlocutory orders. Whidbey does not clearly explain why Commission review must occur now rather than after issuance of any final order regarding Whidbey's failure to negotiate in good faith and sanctions. Nonetheless, should the Commission choose to exercise its discretion to review the bad faith conclusion from Order 04, there may be some merit to affirming the ALJ's findings now so that the sole remaining issue to be briefed will properly address sanctions. Sprint would support any path that would minimize its future expense in this docket.

B. Whidbey Was Legally Obligated To Negotiate in Good Faith; The Commission Has Full Authority To Consider Allegations Of Bad Faith In Arbitration Proceedings Under §252(b)(5).

5 Although it is less than clear from Whidbey's Petition, Whidbey seems to claim it has no duty to negotiate in good faith, and that the Commission has no authority to consider and resolve this issue in the context of an arbitration proceeding. Whidbey is wrong on both counts. First, Whidbey erroneously claims that 47 C.F.R. § 51.301(c) does not apply to it. (Petition footnote 10). That regulation states:

> "An incumbent LEC shall negotiate in good faith the terms and conditions of agreements to fulfill the duties established by **§§ 251(b)** and (c) of the Act....

(c) 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:...

(4) Conditioning negotiation on a requesting telecommunications carrier first obtaining state certification; ...

(6) Intentionally obstructing or delaying negotiations or resolutions of disputes."

6 As explained in Sprint's Petition for Interconnection (paragraph 9, page 3) Sprint sought interconnection under **§ 251(b)** of the Act. Accordingly, Whidbey assumed the duty to negotiate in good faith by the express terms of 47 C.F.R. § 51.301(a). In addition, the FCC in its key initial Order implementing the Act in 1996 stated: "Even where there is no specific duty to negotiate in good faith, certain principles or standards of conduct have been held to apply.... We conclude that intentionally obstructing negotiations also would constitute a failure to negotiate in good faith, because it reflects a party's unwillingness to reach agreement."[2]

7 Furthermore, the FCC explained that "state commissions have authority, under § 252(b)(5) to consider allegations that a party has failed to negotiate in good faith."[3] Therefore, the only time and place for considering such allegations would have to be in the context of a § 252(b)(5) arbitration proceeding such as was commenced by Sprint's Petition in this docket. Thus, there is no authority (and Whidbey cites none) for requiring the Commission to use an adjudicative proceeding to develop a record, as argued in Whidbey's Petition (page 13). While the FCC did state 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

---

[2] *See, In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996,* CC Docket Nos. 96-98 and 95-195, First Report and Order, FCC 96-325 (rel. August 8, 1996) at paragraph 148.

[3] *Id.* paragraph 143.

circumstances underlying the negotiations[4] the ALJ complied with this directive. The ALJ was fully apprised of all of the facts and circumstances underlying the negotiations that led to the filing of the Petition for Arbitration, invoking the Commission's help to move Whidbey off its recalcitrant position, based upon the record created **by Whidbey**.

C. The Facts of Record Support The ALJ's Findings

8 Whidbey incorrectly assumes there is no "record" in this docket even though Whidbey has submitted record evidence in its declarations and exhibits attached to its Motion for an Order of Dismissal for Lack of Jurisdiction and Brief in Support of Whidbey's Answer to Petition for Arbitration. "Record" according to the Dictionary of Modern Legal Usage, Garner (Second Ed. Oxford 1995), refers to the official report of a proceeding in any case and includes "all the filed papers in the case." That dictionary also notes "in administrative law, record refers to all considerations actually taken into account in deciding an issue." Order 04 clearly establishes that the ALJ considered "the record." The record more than supports the finding that Whidbey violated the specific duties under 47 C.F.R. §§ 51.301(c)(4) and (6).

1. Whidbey refused to negotiate because Millennium had not first obtained state certification.

9 Whidbey has the audacity to claim "Whidbey's position on this issue has always been straightforward: Sprint should demonstrate that the operations under the contemplated ICA would not be unlawful." (Petition p. 9) Apparently Whidbey did not read footnote 5 in Order 04, which states that Whidbey's not-straightforward position was a key reason why the ALJ concluded that Whidbey violated 47 C.F.R. 51.301(c)(4).

10 There can be no question that Whidbey repeatedly, and by its own admission would not negotiate with Sprint until Sprint proved that Millennium was registered with the Commission.

---

[4] *Id.* paragraphs 150 and 154.

11 Whidbey said:

> First, to the best of Whidbey's knowledge, Millennium Cable is not authorized by the Washington Utilities and Transportation Commission to provide local exchange telecommunications services in the State of Washington, or, more particularly, in the area encompassed by Whidbey's South Whidbey exchange. Thus, if the purpose of the requested interconnection being request of Whidbey by Sprint is to facilitate an exchange of traffic with respect to which Millennium Cable is (or would be) providing local exchange telecommunications services, without Millennium Cable being properly authorized by the Washington Utilities and Transportation Commission to provide such services in the relevant geographic area, Whidbey would likely be unwilling to provide such interconnection on the basis that such interconnection has an unlawful purpose. That issue – whether the interconnection requested by Sprint is for the purpose, either in whole or in part, of facilitating the provision by Sprint's customer of local exchange telecommunications services in violation of the laws of the State of Washington – is a significant initial issue that needs to be resolved before interconnection discussions can proceed.

Snyder letter to Cowin, June 22, 2007 (Exh. F to Sprint's Petition for Arbitration).

> With regard to this last issue and with exceptions not here relevant, under the laws of the State of Washington, an entity providing telecommunications services to the public for hire must be registered with the Washington Utilities and Transportation Commission ("WUTC"). RCW 80.36.350. Whidbey has endeavored to ascertain whether Sprint's wholesale customer is so registered, and it does not appear to be. A violation of the requirement for registration with the WUTC is a violation of Washington's public services laws. Aiding or abetting such a violation carries civil and criminal penalties. See, generally, RCW 80.04.380, -.385, -.387 and -.390. Whidbey is concerned that if, knowing the identity of Sprint's wholesale customer and it appearing that such customer is not registered with the WUTC, Whidbey were to provide the "interconnection" that Sprint appears to be seeking, so doing could potentially be viewed as aiding or abetting the unlawful provision of service by Sprint's wholesale customer, and Whidbey or its personnel might thereby become exposed to potential liability for civil or criminal penalties. Under these circumstances, Whidbey does not feel that 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 assurance that the service Sprint intends to facilitate by the requested interconnection and contemplated traffic exchange is not unlawful.

12 Snyder letter to Pfaff, August 10, 2007 (Exh. 11 to Attachment 4 to Answer of Whidbey to Petition for Arbitration).

13 Whidbey's Answer (p. 7) stated as Issue 1, "Is Whidbey required to provide local interconnection to Sprint where the principal, if not the sole purpose for the interconnection Sprint derives, is to facilitate the provision of telecommunications service by an entity that is not registered with the Commission as a telecommunications company, or required by RCW 80.36.350?"

14 The only way to interpret Whidbey's position is that Whidbey claimed that Millennium must register with the WUTC before Whidbey would negotiate, which pre-condition is expressly declared to be a violation of the duty to negotiate in good faith by 47 C.F.R. 51.301(c)(4).

15 If the FCC found that an ILEC would violate its good faith obligations by conditioning negotiations of the requesting carrier (Sprint) on obtaining state certification (which Sprint had), then certainly this obligation would be violated by an even more attenuated ILEC demand that Sprint prove its customers had such a certification.

16 In addition, Whidbey's alleged fears about aiding and abetting criminal conduct are not well taken because Whidbey's experienced telecommunications counsel should have known that a lack of state certification is no barrier to interconnection negotiations under 47 C.F.R. 51.301(4). Whidbey could not violate Washington law by the act of negotiating an ICA with a certificated carrier.

17 Whidbey's petition only perpetuates its unreasonable, illogical position that Order 04 rejected, finding that Whidbey violated the federal law. 47 C.F.R. 51.501(4).[5]

---

[5] The Supplement to Petition for Interlocutory Review should be stricken as irrelevant and filed without authority. It should be given no consideration. For the first time, Whidbey's raises a rule, WAC 480-120-061(3), as a reason to refuse to negotiate an ICA. What is relevant is the position Whidbey took prior to the arbitration proceeding, which was a refusal to negotiate because Millennium wasn't registered. On its face, the rule is inapplicable because Sprint – the company requesting interconnection service – was registered.

18 Order 04 dismissed Whidbey's first "threshold issue" on the basis of directly applicable law in the FCC's Order in *In the Matter of Time Warner Request for Declaratory Relief*, WC Docket No. 06-55 (DA 07-709), 22 FCC Rcd. 3513 (2007). Not only did Whidbey simply refuse to accept the FCC's decision in that matter, it then asserted a nonsensical state law basis (i.e. the lack of Millennium's registration) for refusing to negotiate and then tried to claim that it really wasn't making that claim after all. Clearly all of these baseless objections were intended to delay negotiations and competition in Whidbey's serving areas.

2. Whidbey's conduct can only be construed as "intentionally obstructing or delaying negotiations."

19 Whidbey claims it could not have violated the duty to negotiate in good faith by insisting that Sprint prove it is a telecommunications carrier. Sprint will not repeat the arguments made on this issue in its "Threshold Issues" Brief filed on December 7, 2008. The bottom line is that legal authority directly on point prior to the time Sprint filed its Petition held that Sprint's business model established that Sprint was a "telecommunications carrier." The Burt Declaration was not necessary to Order 04's conclusions that abided by controlling law.

20 Whidbey's second "threshold issue," as well as its outright refusal to provide Local Number Portability ("LNP") blatantly demonstrates that it was intentionally obstructing or delaying negotiations. That is because Whidbey maintained an unreasonable position because every federal court that considered the issue rejected Whidbey's position.[6] Given this

[6] *Consolidated Comm. Fort Bend v. Public Util. Comm'n*, 497 F.Supp.2d 836 (W.D. Tex. 2007); *Sprint Communications Co., L.P. v. Nebraska Public Service Comm'n,*, 2007 WL 2682181, (D. Neb.) September 7, 2007 (No. 4:05CV3260); *Berkshire Telephone Corp. v. Sprint Communications Co., L.P.*, 2006 WL 3095665, (W.D.N.Y.) October 30, 2006 (No. 05-CV-6502 CJS); and *Harrisonville Telephone Company v. Illinois Commerce Commission* No. 06-73-6PM (S.A. Ill.) (September 5, 2007) (Attachment "A"). Further, these cases were all filed prior to the FCC's determination in WC Docket No. 06-55

situation, the ALJ could only conclude Whidbey was using the "telecommunications carrier" claim to stall negotiations.[7]

21 While Sprint requested sanctions under 47 C.F.R. §§ 51.301(c)(4) and (6), the Commission also has authority to enforce WAC 480-07-345(3), which incorporates CR 11(b) sanctions against maintaining a position that is not "warranted by existing law ..." and that it is "interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation." The standard for review of a fact-finder's (*i.e.*, trial court) imposition of sanctions is an "abuse of discretion." *Eugster v. City of Spokane*, 110 Wn. App. 212, 231, 39 P.3d 380 (2002).

22 Whidbey flatly refused to provide LNP,[8] for the same two "threshold" reasons it refused to negotiate an ICA. It never raised the issue of whether Voice over Internet Protocol (VoIP) providers were required to offer LNP. Indeed, that issue is completely irrelevant to Whidbey's obligations as an ILEC to provide LNP to Sprint under 47 U.S.C. § 251(b)(2) and 47 C.F.R. 52.23(c). Therefore, the FCC's November 8, 2007 LNP Order provides no excuse for Whidbey to refuse Sprint's request for LNP.[9]

23 The ALJ reviewed the correspondence between Sprint and Whidbey since Sprint filed its LNP and interconnection requests. In every Whidbey correspondence, Whidbey raised

---

[7] *See also Arbitration of: Sprint Comm. Co. L.P. v. Ace Comm. Group et al.*, Order On Rehearing, Iowa Dep't of Commerce Utilities Board, Nos. AREB-05-2, ARB-0505, and ARB-05-6 (Nov. 28, 2005); *In the Matter of Sprint Communications Company L.P.'s Petition for Arbitration,* Order No. 43052-INT-01, 2000 WL 2663730 (Ind. Util. Reg. Comm'n (Sept. 6, 2006); *Application of Sprint Communications Company L.P. For Approval of the Right to Offer, Render, Furnish or Supply Telecommunications Services Etc.*, Penn. Pub. Util. Comm'n Order No. A-310183F0002AMA *et al.* (Dec. 1, 2006); *In the Matter of the Petition of Sprint Communications Company, L.P.,* Arbitrator's Award, Ohio Pub. Util. Comm'n, Case No. 06-1257-TP-ARB (Feb. 28, 2007); *Application of Sprint Communications Company, L.P.*, Final Order No. 541048 Okla. Corp. Comm'n, Cause No. PUD 200700054 (June 20, 2007).

[8] *See*, De Martini letter to Sanilov, July 6, 2007, Exh. 6 to Declaration of Julia H. De Martini.

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

specious reasons why it could not, or would not, work with Sprint, starting with its initial verbose letter setting forth Whidbey's "rules of engagement" on June 5, 2007[10] culminating in its August 10, 2007 letter stating that Whidbey was at an impasse until its "threshold issues" were resolved.[11] These documents on their face constitute clear evidence from which a reasonable, objective fact-finder could conclude that Whidbey wanted to delay negotiations. Hence, there is sufficient basis in the record for finding that Whidbey violated 47 C.F.R. 51.301(c)(6).

D. Whidbey Was Not Denied Due Process.

24 Whidbey had notice that Sprint sought sanctions for its conduct since Sprint filed its Petition for Arbitration (paragraph 23, p. 8). Whidbey did not even answer Sprint's failure to negotiate in good faith claim when it filed its Answer and Brief in Support of Whidbey's Answer to Petition for Arbitration. Therefore, Whidbey chose not to state its position when it had the opportunity to do so.

25 Whidbey now claims an evidentiary hearing should have been held with the opportunity to cross-examine witnesses before making any finding that Whidbey did not negotiate in good faith. Whidbey cites no authority for this claim under the Telecom Act and no authority under Washington law.

26 Indeed, Washington Supreme Court rejected similar technical Due Process arguments in *WITA v. WUTC*, 149 Wn.2d 17, 65 P.3d 319 (2003). In that case, the Court held that the Commission need not hold an adjudicative proceeding before designating an additional eligible telecommunications carrier in areas served by rural independent telephone companies. The court found that these companies did not have a protectable property interest in being the only ETC that would be harmed by designating other ETC's after argument at a Commission

---

[10] Sprint Petition for Arbitration, Exh. D.

[11] Exh. 11 to Attachment 4 to Answer of Whidbey to Petition for Arbitration.

Open Meeting. The Court rejected arguments very similar to those raised by Whidbey in its Petition.

27 There is no federal requirement or case that addresses the procedure for sanctions for 47 C.F.R. 51.301 violations. An appropriate analogy, however, would be the procedure for assessing CR 11 sanctions when an attorney/party asserts a claim not warranted by existing law or that is interposed to harass or cause unnecessary delay or expense. A leading authority on Washington practice notes:

> Due process does not usually require a full evidentiary hearing as a prerequisite for CR 11 sanctions; the use of extensive collateral procedures ("satellite litigation") is to be avoided. There is no entitlement to a jury trial, discovery should be allowed only in extraordinary circumstances, and the court should generally limit the scope of the sanction proceedings to the record. Whether and to what extent an additional hearing is required will vary depending on (a) the circumstance in general; (b) the type and severity of the sanction under consideration; (c) the judge's knowledge of the facts and degree of participation in the proceedings; and (d) the need, if any, for further inquiry. Providing a chance to respond to the charges through submission of a brief or presentation of argument is usually all that due process requires.

Tegland, 15 Wash. Prac., Civil Procedure § 51.11; *see also, Watson v. Maier*, 64 Wash. App. 889, 827 P.2d 311 (1992).

28 Here Whidbey has had the opportunity to be heard by the very Petition at issue here. Furthermore, Whidbey will have an additional opportunity to be heard in the briefs called for by Order No. 04 before any sanctions will be imposed.

29 An evidentiary hearing and cross-examination would be futile because the evidence to sustain the violation was created by Whidbey in its pre-arbitration correspondence with Sprint, which Whidbey clearly could not deny or object to including in the record. Whidbey has only underscored the appropriateness of Order 04's finding on failure to negotiate in good faith by continuing to raise in its Petition an untenable construction of its position – namely, that Whidbey never said that it would not negotiate until Millennium was registered.

30 In sum, Whidbey had notice, and has, or will have a full opportunity to be heard before the imposition of sanctions. Therefore, no further proceedings should be conducted, Order 04's finding regarding failure to negotiate in good faith should be affirmed and the parties be directed to briefing on sanctions.

DATED this 13th day of February, 2008.

GRAHAM & DUNN PC

By _____

Judith A. Endejan
WSBA# 11016
Email: jendejan@grahamdunn.com
Attorneys for Sprint Communications Company, L.P.

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 CERTIFICATE OF SERVICE

I certify that on February 13, 2008, I served the attached document entitled Sprint Communications Company, L.P.'s Opposition to Petition for Interlocutory Review by sending a copy by electronic mail and U.S. mail, unless otherwise specified, to the following interested parties or attorneys of parties:

Sent Via E-Mail and Federal Express Mail
Richard A. Finnigan
Law Office of Richard A. Finnigan
2112 Black Lake Boulevard SW
Olympia, WA 98512
Tel: (360) 956-7001
rickfinn@localaccess.com
Attorney for Whidbey Telephone Company

Sent Via E-Mail Only
ALJ Adam E. Torem
Administrative Law Judge
Washington Utilities and Transportation Commission
1300 South Evergreen Park Drive SW
Olympia, WA 98504-7520
atorem@wutc.wa.gov

Filed by E-Mail; Original + 4 copies sent Via Federal Express Mail
Ms. Carole J. Washburn, Executive Secretary
Washington Utilities and Transportation Commission
1300 South Evergreen Park Drive SW
Olympia, WA 98504-7250

DATED at Seattle, Washington this 13th day of February, 2008.

GRAHAM & DUNN PC

By _____

Darlyne T. De Mars
Legal Secretary to Judith A. Endejan
Attorneys for Sprint Communications Company, L.P.
E-mail: ddemars@grahamdunn.com