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 WHIDBEY TELEPHONE COMPANY'S REPLY CONCERNING PETITION FOR INTERLOCUTORY REVIEW

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I. INTRODUCTION

1 On February 13, 2008, Sprint Communications Company, L.P. ("Sprint") filed its Opposition to Petition for Interlocutory Review ("Sprint's Opposition"). Whidbey Telephone Company ("Whidbey") hereby files its Reply to Sprint's Opposition.

2 This Reply will address two primary issues. The first is Sprint's miscitation of legal authority. The second is Sprint's erroneous assertion that there is a sufficient record for the Administrative Law Judge's ("ALJ") finding of fact and conclusion of law that Whidbey did not fulfill its obligation to negotiate in good faith.

II. SPRINT'S CITATION TO LEGAL AUTHORITY IS MISLEADING

3 Sprint relies on WITA v. WUTC, 149 Wn.2d 17, 65 P.3d 319 (2003) as authority for the proposition that Whidbey is not denied due process due to the failure to allow Whidbey the opportunity to be heard on the question before the ALJ, present testimony and evidence before the ALJ, cross examine adverse witnesses, and present argument before a finding of fact was made and a conclusion of law was reached by the ALJ that Whidbey had breached its obligation to negotiate in good faith.[1] The issue before the Court in WITA was whether incumbent local exchange companies had a protected property interest that would be infringed by the designation of a competitive eligible telecommunications carrier ("ETC"). Under the Administrative Procedures Act, an agency engages in one of three types of action when it makes a decision. It engages in

[1] Sprint's Opposition at ¶26. Because of its exemption from subsection 251(c) of the Communications Act of 1934, as amended, Whidbey does not concede that it was subject to an obligation to negotiate. Whidbey further maintains that even if it were subject to an obligation to negotiate in good faith, it did not violate that obligation. The threshold issues raised by Whidbey were presented in good faith, and not for the purpose of delay. The threshold issues could easily have been addressed by Sprint on a factual basis as soon as they were made.

either (1) rulemaking, (2) adjudication or (3) other agency action. In WITA, the Washington Supreme Court determined that the designation of an ETC fell under the category of "other agency action" and that the Commission acted properly without proceeding to adjudication. The WITA decision has little, if any, applicability in the matter pending before the Commission. Here, the ALJ has made a finding of fact as to specific conduct engaged in by Whidbey. The ALJ also then reached a legal conclusion that Whidbey's conduct constituted a breach of its obligation to negotiate in good faith. The entry of the specific finding and conclusion related to Whidbey's conduct is the type of action for which an adjudication is needed.

4 The ALJ made a finding, reached a conclusion and called for briefing on the appropriate penalty to be imposed, all without providing Whidbey a hearing and an opportunity to be heard. Sprint argues that Whidbey has not cited to a state authority on point that Whidbey is absolutely entitled to an adjudication on the issue the ALJ decided sua sponte.[2] The reason that Whidbey has not cited to a specific Washington state case precisely on all fours with the situation Whidbey faces is that none exists. What we are dealing with here are issues so fundamental to due process that it is highly unlikely that a similar situation has ever arisen before any state agency. The basic principles of due process are at stake here. Whidbey's motives have been condemned and its reputation

[2] Sprint's Opposition at ¶25. Sprint actually states that "Whidbey cites no authority for this claim under the Telecom Act and no authority under Washington law." Neither statement is correct. Whidbey cited the FCC rules adopted pursuant to the Telecom Act that failure to negotiate in good faith must be "proven" – which certainly requires a hearing. 47 C.F.R. §51.301(c). Whidbey also cited the bellweather cases of Mathews (U.S. Supreme Court) and Ritter (Washington Supreme Court) on the elements of due process, as well as Mr. Wallis' commentary on the subject.

damaged, without an opportunity for Whidbey to present evidence or argument on the issue.[3] To the ALJ, the only question left is what penalty should be imposed.

5 Sprint further argues that the ability to present a brief on the penalty somehow provides Whidbey with due process.[4] Again, this is after the fact, after Whidbey's reputation has been damaged due to the precipitous action of the ALJ and after the ALJ has pre-judged the issue. Even if no sanction is applied, the ALJ's finding of fact and conclusion of law would remain. The manner in which that finding and conclusion were arrived at simply does not square with the fundamentals of due process, as pointed out in Whidbey's Petition for Interlocutory Review.

6 As Whidbey argued in the Petition for Interlocutory Review, the Washington Supreme Court has adopted the Mathews balancing test. See, Ritter v. Board of Commissioners of Adams County Hospital Dist. No. 1, 96 Wn.2d 503, 511, 637 P.2d 940 (1981) discussing Mathews v. Eldridge, 424 U.S. 319, 96 S. Ct. 893, 47 L. Ed.2d 18 (1976). A more recent Washington Supreme Court case clarifies that full, pre-deprivation hearing procedure must apply where there is a risk of erroneous damage to reputation. Nguyen v. Dep't of Health, 144 Wn.2d 516, 524-525, 29 P.3d 689 (2001) quoting from Addington v. Texas, 441 U.S. 418, 99 S. Ct. 1804, 60 L. Ed.2d 323 (1979). As Whidbey pointed out in the Petition for Interlocutory Review, applying the balancing test set forth in Mathews clearly demonstrates that a hearing should have been afforded to

[3] The only issues on which the ALJ entertained evidence or invited argument were the "threshold issues." Order 03 at ¶4. Further, the only evidence that the ALJ invited was an affidavit or declaration on behalf of Sprint relating to the "threshold issues." Ibid. The ALJ did not provide an opportunity for Whidbey to present any evidence, by live testimony or affidavit, regarding the "good faith" issue that he then undertook to decide.

[4] Sprint's Opposition at ¶28.

Whidbey before the ALJ made his finding and conclusion as to Whidbey's conduct. A post determination briefing as to the appropriate sanction is not an adequate provision of due process protections.

7 Sprint also cites to the standards that would apply to a CR 11 violation as leading to the conclusion that Whidbey was not denied due process.[5] Under Sprint's view, an adjudicative proceeding would never be heard since virtually every determination could then be made on the pleadings. More to the point, the material cited by Sprint really stands for no more than the concept that the process that must be followed in order to constitute due process varies under the circumstances. As pointed out by the quotation cited by Sprint,

> Whether and to what extent an additional hearing is required will vary depending on (a) the circumstances 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 proceeding; and (d) the need, if any, for further inquiry. Providing the chance to respond to the charges through submission of a brief or presentation of argument is usually all that due process requires.[6]

In this case, Whidbey was not given even the opportunity to present argument before the ALJ made his finding of fact and reached his conclusion of law concerning Whidbey's conduct. Thus, even the limited due process of a CR 11 proceeding was not provided to Whidbey. Further, as set out above, the discussion by Tegland notes that there are a variety of circumstances which will determine whether the process used comports with due process requirements.

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[5] Sprint's Opposition at ¶27.
[6] Sprint's Opposition at ¶27 citing Tegland, 15 Wash. Proc., Civil Procedure §51.11.

8 Unlike a CR 11 proceeding where the question is the conduct of an attorney during the proceeding before the judge, in this case the ALJ was looking back at conduct that occurred or did not occur prior to the proceeding. The ALJ did not have the first-hand knowledge of the conduct that a judge in a CR 11 proceeding would have. The determination of historical fact is exactly what an adjudicative proceeding is designed to produce. In the absence of such a proceeding, the ALJ simply engaged in speculation as to Whidbey's motives.[7] As will be discussed below, Whidbey did not act in bad faith, but instead with an appropriate concern about compliance with legal requirements. In this case, there is no set of circumstances that would support a rational conclusion that Whidbey has been accorded due process.

III. SPRINT'S RELIANCE ON THE "RECORD" IS MISGUIDED

9 To begin, Whidbey needs to point out that Sprint uniformly mischaracterizes Whidbey's position. Sprint states that Whidbey's position is that it would not negotiate unless Millennium registered with the Commission.[8] This is not, and has never been, Whidbey's position. Whidbey's position has been that Sprint's facilitation of the offering of intrastate telecommunications service by Millennium raises the question of whether Millennium needs to be registered and, if so, will Millennium register with the Commission.[9] If Sprint had ever bothered to respond that if it were determined at some later point that Millennium is required to be registered, Millennium would register, that

[7] In fact, the FCC contemplated that the determination of whether the duty to negotiate in good faith has been violated is one of examining "the subjective intent with which the person in question has acted." In the Matter of Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, CC Docket 96-98, First Report and Order, FCC 96-325 at ¶148 quoting UCC §1-201(84) ("FCC Order").
[8] Sprint's Opposition at ¶14.
[9] Order 04 does not actually answer this question in a definitive manner.

would have been a sufficient commitment. Instead, Sprint's position was that the fact that Millennium may be acting illegally and that Sprint may be intending to use Whidbey's services to facilitate such illegal activity is irrelevant to Whidbey entering into an agreement with Sprint, even if Whidbey has been told that the services provided by Whidbey would be used to further such illegal activity. An analogous situation would be asking someone to lend you a car, telling him that you are likely to use the car to rob a bank and, when he questions whether he should lend you the car, asserting that the use you intend to make of the car is irrelevant. Indeed, as pointed out in the supplement to Whidbey's Petition for Interlocutory Review, Whidbey's concerns were completely consistent with the Commission's own rule, WAC 480-120-061(3).

10 Sprint argues that Whidbey intentionally raised the issue of Sprint's status as a common carrier only for purposes of delay, and, thus, this action supports the ALJ's interpretation of Whidbey's motives.[10] What is not in the "record", since Whidbey was not given an opportunity to present a record, is that Whidbey undertook an investigation at its own cost to determine whether Sprint's relationship with its Millennium partner was consistent with common carriage. That included, among other things, investigating whether Sprint had some offering applicable to the State of Washington like the wholesale tariffs in other states that would make it clear that Sprint was operating as a common carrier in its relationship with Millennium. The fact that Whidbey undertook at its own cost an investigation of whether Sprint would qualify as a common carrier clearly demonstrates that Whidbey was not intentionally delaying negotiations. Whidbey

[10] Sprint Opposition at ¶10, et seq.

repeatedly invited Sprint to provide Whidbey with information that would permit Whidbey to conclude that Sprint was acting as a common carrier, but Sprint steadfastly refused to provide basic information that it would later provide to the ALJ on December 6, 2007.[11] Sprint could have facilitated negotiations, but chose not to do so.[12] Whidbey undertook a very proactive effort to find the answers that Sprint refused to provide. There was no intentional delay.

11 Sprint argues that there is a sufficient record to support the ALJ's determination concerning Whidbey's conduct.[13] Sprint discusses at great length the exhibits that were attached to the Petition for Arbitration and Whidbey's responsive pleading to Sprint's Petition for Arbitration and asserts that such pleadings constitute a sufficient "record." Sprint even makes the novel argument that Whidbey's opportunity to respond to the allegation that Sprint made in its Petition that Whidbey had engaged in conduct that violated Whidbey's obligation to negotiate in good faith was by submitting a responsive pleading to Sprint's Petition for Arbitration.[14]

12 What Sprint is, in essence, doing is arguing that this matter was properly determined as though it were a motion for judgment on the pleadings. However, no such motion was, in fact, ever made.[15] Further, Whidbey had no warning that such a "motion" was pending and did not have the opportunity to respond to said motion.

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[11] See discussion beginning at ¶16, below.

[12] This lack of response by Sprint is a violation of Sprint's duty to negotiate in good faith. See, FCC Order at ¶155. This is an issue raised by Whidbey in its Answer to Sprint's Petition (see ¶s 8 and 21) and was not addressed by the ALJ.

[13] Sprint's Opposition at ¶8, et seq.

[14] Sprint's Opposition at ¶24. In fact, Whidbey denied Sprint's allegation and alleged that Sprint violated Sprint's obligation to negotiate in good faith. Whidbey's Answer to Sprint's Petition at ¶s 8 and 21.

[15] A judgment on the pleadings is not available in this context since Whidbey denied Sprint's allegations. See, Whidbey's Answer to Sprint's Petition at ¶s 8 and 21.

13 It should also be noted that at the pre-hearing conference, Sprint and Whidbey agreed that the exhibits that were attached to Sprint's Petition and to Whidbey's Answer to Sprint's Petition would not need to be presented through foundational testimony. However, that is clearly not the same as agreeing that those exhibits are admitted into the record. The opportunity to object to such exhibits on substantive grounds was retained. Thus, as of the date of the ALJ's finding of fact and conclusion of law concerning Whidbey's conduct, the exhibits had not been admitted into the evidentiary record. Further, if this was the equivalent to a motion for judgment on the pleadings, Whidbey was not given the opportunity to submit argument and declarations and other evidence explaining Whidbey's position.

14 Sprint also argues that Whidbey's own letters show the basis for a factual determination and conclusion of law that Whidbey violated its duty to negotiate in good faith.[16] The ALJ did not include the analysis that Sprint argues in his decision. Thus, this is all conjecture by Sprint. The fact that the ALJ did not go into the detail Sprint provides as an attempt to bootstrap support for the ALJ's decision underscores the denial of due process to Whidbey by the inadequate process used by the ALJ.

15 Further, the use of Whidbey's letters by Sprint in Sprint's after-the-fact rationalization does not comport with the concept that Whidbey would have the opportunity in a hearing, or by analogy to summary judgment or judgment on the pleadings through the submission of declarations, to explain the context in which those documents arose.

[16] Sprint's Opposition at ¶10, et seq.

16 For example, one very clear piece of the contextual setting is the fact that Whidbey asked for information from Sprint that would show that Sprint was qualified as a common carrier for purposes of the requested interconnection. Sprint did not provide that information until it submitted the Declaration of Mr. Burt on December 6, 2007, well after the start of the arbitration proceeding and months after Whidbey requested such information.[17]

17 In fact, the ALJ relied on that Declaration for his conclusions that Sprint qualified as a common carrier in addressing the threshold issues. Given that the factual information that was requested by Whidbey was not provided until December 6, 2007, how could Whidbey's letters in June, July and later be evidence of negotiation in bad faith? Rather, when placed in proper context, it shows that Sprint, through its own conduct, unreasonably delayed the process by refusing to respond to basic questions that were raised by Whidbey and only did so when it was required by the ALJ to submit the declaration.

18 At this juncture, Sprint's citation to Whidbey's letters is mere conjecture as to whether the statements in those letters constitute a factual demonstration that Whidbey engaged in behavior that was improper. The ALJ offered no such recitation of facts as Sprint hypothecates may be the case. There has been no hearing for those facts to be developed. Contrary to Sprint's assertions, there is not a sufficient record for the determinations made by the ALJ.

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[17] In Whidbey's briefing on the threshold issues, Whidbey acknowledged that the Declaration began to address the concerns Whidbey had raised on the common carrier issue. However, by refusing to provide the requested information until December, Sprint left Whidbey without the necessary information to evaluate Sprint's request. Further, as pointed out earlier, Sprint's failure to respond is a violation of Sprint's obligations to negotiate in good faith.

19 To the extent that Sprint is arguing that Whidbey's letters, in essence, constitute a per se violation of the FCC's rules, both Sprint and the ALJ have apparently deliberately changed the language of the rule upon which they have relied and have not conducted a careful analysis of the rule.[18] 47 C.F.R. §51.301(c)(4) requires that actions must be "proven" before a breach of the duty to negotiate in good faith can be found. Beyond that, the specific provision in subpart (4) of §51.301(c) reads "Conditioning negotiation on a requesting telecommunications carrier first obtaining state certification" (emphasis added). To the experienced telecommunications attorney, the choice of the word "certification" denotes the issuance of a certificate of public convenience and necessity, which is the process used to allow entrance of telecommunications carriers in most states other than Washington. The process for a certificate of public convenience and necessity requires that findings be made. That process can be time consuming. This is contrasted with the registration process used in Washington. The Washington registration process is simple and causes no delay to entry. Neither Sprint nor the ALJ provided any support for the concept that "registration" is synonymous with "certification." That is because those processes mean very different things in telecommunications. There is certainly no indication of anything in the FCC orders or in other rules that "registration" is the equivalent of "certification." Indeed, when the FCC discussed its adoption of subpart (c)(4) of §51.301, the concern expressed by the FCC was the delay that could be

[18] If Sprint and the ALJ are, in fact, asserting a per se violation, that is inconsistent with the FCC Order. The FCC made it clear that it was adopting only one per se violation – failure to include a provision that the agreement may be amended to take into account changes in law. FCC Order at ¶152-153. The FCC specifically declined to adopt other per se violations: "We decline to find that other practices identified by parties constitute per se violation of the duty to negotiate in good faith." FCC Order at ¶153.

introduced by the certification process.[19] Having substituted one term of art for another term of art without explanation, Sprint and the ALJ have rewritten the FCC's rule without explanation or supporting evidence.

20 Further, even if Whidbey's view of the meaning of §51.301(c)(4) were wrong, that does not mean Whidbey was acting in bad faith. A good faith legal position, which is advanced based upon the very wording of the rule itself, may be erroneous, but to find that it is in bad faith would require affirmative evidence of such bad faith. There is no such evidence here,[20] for there is not yet an evidentiary record in this proceeding on the relevant issue, and, even if the correspondence between Sprint and Whidbey are deemed to be a portion of such a record, those letters are devoid of any basis on which to conclude that Whidbey's concern with registration was animated by bad faith. If there is a difference in interpretation of regulation which is advanced in good faith (which is the case here) and that distinction is later resolved by a quasi-judicial determination, the resolution of the dispute over the meaning of a rule does not then relate back and support a conclusion that because a particular legal theory was advanced, it constituted bad faith on the part of the party advancing that theory. There is absolutely no support for Sprint's defense of the ALJ's order.

IV. CONCLUSION

21 Whidbey respectfully requests the Commission grant Whidbey's Petition for Interlocutory Review.

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[19] FCC Order at ¶154.

[20] As noted previously, Whidbey's actions were not motivated by any intention to introduce delay, but rather by genuine concern for the issues Whidbey presented. Whidbey was not acting in bad faith, and the promptness of Whidbey's written responses to Sprint, and the care and effort that is manifest in those responses, belies any allegation of bad faith.

Respectfully submitted this 22nd day of February, 2008.

WHIDBEY TELEPHONE COMPANY

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