[Service Date May 9, 2008]

BEFORE THE WASHINGTON STATE
UTILITIES AND TRANSPORTATION COMMISSION

In the Matter of the Petition for Arbitration of an Interconnection Agreement Between	)	DOCKET UT-073031
	)	ORDER 05
SPRINT COMMUNICATIONS COMPANY L.P.	)	
	)	DENYING PETITION FOR
with	)	INTERLOCUTORY REVIEW
	)	AND CLOSING ARBITRATION
WHIDBEY TELEPHONE COMPANY	)	DOCKET
	)	
Pursuant to 47 U.S.C. Section 252(b).	)	
. . . . .	)	

1 ***SYNOPSIS.*** *The Commission denies Whidbey Telephone Company's Petition for Interlocutory Review of an Arbitrator's order which included a preliminary finding that Whidbey violated its duty to negotiate with Sprint Communications Company L.P. in good faith. The Commission closes this arbitration proceeding, because the parties now have a fully negotiated interconnection agreement. In this context, whether Whidbey should be sanctioned for its behavior does not warrant further proceedings, but the Commission admonishes the company for its conduct.*

MEMORANDUM

2 **PROCEEDINGS.** On October 17, 2007, Sprint Communications Company L.P. (Sprint) filed with the Washington Utilities and Transportation Commission (Commission) a petition requesting arbitration pursuant to 47 U.S.C. § 252(b) of the Telecommunications Act of 1996, Public Law No. 104-104, 101 Stat. 56 (1996) (Act). Sprint served the petition on Whidbey Telephone Company (Whidbey). Sprint, among other things, complained that Whidbey violated its duty under the Act to negotiate in good faith. Sprint recommended as a sanction that Whidbey be required to enter into the Interconnection Agreement (ICA) that Sprint included as part of its petition.

3 On November 2, 2007, Whidbey filed a Motion for an Order of Dismissal for Lack of Jurisdiction that referenced certain "threshold issues" allegedly preventing Whidbey from entering into voluntary negotiations with Sprint with regard to an

interconnection agreement (ICA).[1] On November 16, 2007, Whidbey filed its Answer to Sprint's Petition for Arbitration, specifically setting out three issues it insisted the Arbitrator should determine prior to any hearing on disputed issues about the ICA.[2]

4 The Arbitrator agreed to accept briefs pursuant to a schedule that would allow for early consideration of the issues Whidbey raised as purported barriers to negotiation of an ICA with Sprint. On January 24, 2008, the Arbitrator entered Order 04 "Order Determining Threshold Issues." Order 04 rejected Whidbey's arguments concerning the threshold issues. The Arbitrator found, among other things, that Whidbey's "ongoing refusal to negotiate with Sprint on the various bases set out in its 'threshold issues' rise[s] to the level of obstructionism and intentional creation of impediments to Whidbey's interconnection obligations." The Arbitrator concluded Whidbey was obligated to enter into negotiations with Sprint and that Whidbey's behavior demonstrated the company's failure to meet its duty under the Act to negotiate in good faith.

5 Order 04 provided that if Sprint wished to pursue the issue of good faith negotiation and ask the Arbitrator to impose a sanction, its brief would be due by March 14, 2008. Whidbey's response brief, if needed, would be due on March 24, 2008.

6 Whidbey filed its Petition for Interlocutory Review on February 1, 2008, taking exception to the Arbitrator's finding concerning Whidbey's failure to negotiate in good faith. Whidbey filed a supplement to its Petition on February 5, 2008. Whidbey's arguments are grounded in due process principles and depend on the fundamental point that whether the company violated its duty to negotiate in good faith was not an issue identified by the Arbitrator for briefing in connection with the three threshold issues. Whidbey argues this constitutes a denial of notice and opportunity to be heard, and violates a number of the company's other due process rights.

7 Sprint filed its Opposition to Petition for Interlocutory Review on February 13, 2008. Sprint stated, among other things, that it reached final agreement with Whidbey on an ICA shortly after Order 04 was entered. Sprint stated that while it no longer required the Commission's assistance to obtain an ICA, it requested that the Commission

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

[2] *See* Whidbey Answer, ¶¶ 15-18.

resolve the issues concerning Whidbey's negotiation tactics, including whether Whidbey should be sanctioned for failure to negotiate in good faith.

8 On February 14, 2008, the parties informed the Commission that they would file their fully negotiated ICA with the Commission during the week of February 18-22, 2008.[3] The Commission gave notice on February 15, 2008, that all further briefing requirements and deadlines in the arbitration docket, including dates for briefing questions related to the Arbitrator's finding that Whidbey violated its duty to negotiate in good faith, were suspended pending Commission resolution of Whidbey's Petition for Interlocutory Review. Whidbey filed its Reply Concerning Petition for Interlocutory Review on February 22, 2008.

9 **APPEARANCES:** Richard A. Finnigan, Law Office of Richard A. Finnigan, Olympia, Washington, represents Whidbey. Judith Endejan, Graham & Dunn PC, Seattle, Washington and Jeff Pfaff, Sprint Nextel Corporation, Overland Park, Kansas, represent Sprint.

DISCUSSION

10 This is an arbitration proceeding conducted by the Commission pursuant to delegated powers under federal law as implemented by our procedural rules at WAC 480-07-630 and -640(2)(b). In the context of such a proceeding, we need look no further than Whidbey's Petition and our rules to see that the company's due process argument is wholly without merit.

11 We agree with Whidbey's assertion that "[t]he due process issues raised by this Petition are matters of black letter law."[4] As Whidbey discusses, the 5th and 14th Amendments to the U.S. Constitution, and Article I, Section 3 of the Washington State Constitution provide: "No person shall be deprived of life, liberty, or property without due process of law." Whidbey, however, struggles to identify any protected interest of which it is deprived by the Arbitrator's preliminary finding that the company failed in its duty to negotiate in good faith.[5] Whidbey claims the finding that it failed in its duty to negotiate in good faith is "damaging to Whidbey's standing

[3] Whidbey and Sprint filed their fully negotiated ICA with the Commission under Docket UT-083011 on February 26, 2008.
[4] Petition for Interlocutory Review ¶¶ 11-12.
[5] We note the irony of Whidbey's arguments given that the Arbitrator made his preliminary finding because Whidbey insisted on a "threshold hearing" concerning its duty to negotiate an ICA with Sprint.

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."[6] Perhaps, but there is no showing that is the case. Whidbey neither argues that it suffered any financial or other consequences as a result of any damage to its reputation, nor offers any support for its speculation concerning "collateral consequences." Whidbey simply makes no showing of actual deprivation of property, its only remotely colorable claim. Hurt feelings are not enough to support a constitutional claim.

12 More to the point, even if Whidbey could demonstrate a due process right, it ignores the multiple opportunities for a hearing before any deprivation could occur.

13 Whidbey states correctly that *if* monetary sanctions are imposed, then there would be a "deprivation of property" within the meaning of the due process clauses of the U.S. and Washington Constitutions and Whidbey would be entitled to a hearing. Whidbey ignores that the Arbitrator expressly provided for further process related to the question of good faith negotiation, including an opportunity for Whidbey to brief the issue of whether sanctions are appropriate.[7] There Whidbey would have an opportunity to challenge the basis for the Arbitrator's preliminary finding along with raising other arguments that it should not be sanctioned.[8] Following the arbitration process, Whidbey would have the right to a hearing pursuant to WAC 480-07-640(2)(b), after which the Commission would enter a Final Order[9], which itself would be subject to review via petitions for reconsideration and judicial review.[10]

14 Put mildly, Whidbey's assertion that it has been deprived of property without due process of law is at best premature, because it has not been sanctioned yet nor has the otherwise available process been exhausted. Insofar as the *possibility* of sanctions is

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[6] *Id.* ¶ 13.
[7] It is important to note that arbitration under WAC 480-07-630 is not a hearing process subject to the state Administrative Procedure Act so, to that extent, Whidbey's argument concerning post-hearing review of an order entered during an arbitration is misplaced.
[8] The procedure established by the Arbitrator is analogous to the Commission's process for imposing penalties. Penalties are first imposed on the basis of probable facts found during Commission Staff inquiries into a company's activities. The penalized company then has an opportunity to seek mitigation of the penalty, usually in a Brief Adjudicative Proceeding, at which time it can present evidence and argument challenging the basis for the penalty and assert mitigating circumstances.
[9] WAC 480-07-820(1)(b).
[10] WAC 480-07-850 and WAC 480-07-510 – WAC 480-07-598.

concerned, the Arbitrator provided notice and an opportunity for Whidbey to be heard in the context of the arbitration proceeding.[11]

15 Although we do not need to reach the question in light of our discussion above, we note that Whidbey's Petition for Interlocutory Review is improper. WAC 480-07-630(2) states in relevant part: "Arbitration under this section, however, is not an adjudicative proceeding under the Washington Administrative Procedure Act, Chapter 34.05 RCW." WAC 480-07-810 provides for review only of "orders entered during the course of an adjudicative proceeding." Thus, WAC 480-07-810, by its terms, does not authorize a petition for interlocutory review in an arbitration proceeding, which expressly is not an adjudicative proceeding under the Administrative Procedure Act or the Commission's procedural rules.

16 Even if we were to consider WAC 480-07-810 applicable, it is unavailing.[12]

17 Whidbey contends interlocutory review will prevent substantial prejudice that would occur if it "must continue to follow a procedure that is in violation of due process rights." Whidbey further contends that such prejudice would not be remedied by post-hearing review. We have already discussed in detail that the procedures of which Whidbey complains do not violate its due process rights. Indeed, these procedures provide Whidbey even more process than what is minimally required as a matter of law. Even if the Arbitrator imposed sanctions after giving Whidbey an opportunity to contest the matter, the company could seek review of the Arbitrator's decision in a Commission hearing under WAC 480-07-640(b)(2). There also is the

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[11] This, in point of fact, affords Whidbey more process than it would have were the Commission to penalize the company pursuant to RCW 80.04.405. As previously discussed, in such penalty cases the sanctioned person is afforded a hearing via the Brief Adjudicative Proceeding process *after* a penalty has been assessed. If we allowed this matter to go forward, Whidbey would have the right to challenge the basis for and the proposed amount of any monetary penalty *before* its imposition. Thus, the procedures the Arbitrator already established in this matter, in addition to the post-arbitration opportunities discussed above, more than adequately protect Whidbey's due process rights.

[12] Under WAC 480-07-810(2), the Commission may accept review of interlocutory orders if it finds:

(a) The ruling 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 a 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.

availability of subsequent process, as previously discussed. All of this process more than adequately protects Whidbey from being deprived of its property without due process of law.

18 Whidbey also argues incorrectly that WAC 480-07-810(2)(c) applies because "interlocutory review will save the Commission and the parties substantial effort and expense." Even if the Commission agreed with Whidbey's arguments that the Arbitrator's finding should be reversed because he did not give Whidbey an opportunity to present evidence and argument, the best outcome for which Whidbey could hope would be a remand to the Arbitrator, or to an Administrative Law Judge, for further process. That result is no different than what would have ensued had Whidbey not filed its Petition for Interlocutory Review and not entered into a fully negotiated ICA with Sprint.

19 The parties, however, have entered into a fully negotiated ICA. Thus, while we conclude that Whidbey's petition is without merit, we also find that the entire matter has been overtaken by events that provide sufficient reason to decline Sprint's request that we further consider sanctions against Whidbey.

20 Sprint has achieved its purpose. It has an ICA in place that, being fully negotiated, presumably is as satisfactory to Sprint as the ICA it would have had us impose by way of sanctioning Whidbey for its behavior in the pre-arbitration stage of this process.[13] Although a close call for the reasons discussed below, in this context we cannot justify the expenditure of additional time and expense to pursue the question of good faith negotiation and sanctions.[14]

21 Nevertheless, we think it appropriate to record our concerns regarding Whidbey's conduct both prior to Sprint's petition for arbitration, and following the filing of that petition. Whidbey's conduct in this matter is wholly unacceptable when measured against our expectations for the behavior of the companies we regulate and their representatives.

22 The preconditions Whidbey raised following Sprint's request for negotiation are restated in Order 04 as "threshold issues":

[13] Sprint Petition for Arbitration ¶23.
[14] Sprint may elect, however, to pursue this matter at the FCC.

- 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?

- 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?

- With respect to the South Whidbey Rate Center, is Sprint eligible to submit to Whidbey a bona fide request for local number portability (LNP)?[15]

23 Following Sprint's request for negotiation of an ICA, Whidbey repeatedly insisted that these so-called threshold issues had to be resolved to its satisfaction as a condition precedent to the commencement of negotiations. Whenever Sprint tried to respond meaningfully by, for example, citing authority to show it is a "telecommunications carrier" within the meaning of the Act, Whidbey simply rejected what the authority plainly states.[16]

24 It is significant that some of the barriers to negotiation that Whidbey raised in correspondence with Sprint and in pleadings filed in this docket do not pass muster when considered in light of the FCC's rules that establish basic parameters for evaluating good faith negotiation. With respect to the first threshold issue, for example, 47 CFR §51.301(c)(4) identifies as a potential violation of the duty to negotiate in good faith, conditioning negotiation upon a requesting telecommunications carrier first obtaining state certification.[17] Whidbey argues it has

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[15] Order 04 at ¶¶4-6.

[16] Sprint referred Whidbey to *In the Matter of Time Warner Request for Declaratory Relief*, 22 FCC Rcd. 3513 (2007), which holds that wholesale providers of telecommunications services, such as Sprint, are telecommunications carriers under the Act. Whidbey's designated negotiator, Mr. Snyder, responded to Sprint that the company "respectfully disagrees" that the authority Sprint provide is controlling, raising a new "issue" whether Sprint, as a wholesale service provider, is acting as a "common carrier." This sort of colloquy could be, of course, endlessly carried on when there is no neutral decision maker in place to resolve it.

[17] "A party may not condition negotiation on a carrier first obtaining state certification." *First Report and Order In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996,* 11 F.C.C.R. 15499 at 15577, 11 FCC Rcd. 15499 at ¶154 (August 8, 1996).

not violated this rule because the entity it refers to in its statement of condition is not the "requesting telecommunications carrier" (*i.e.*, Sprint) but, rather, the carrier that is Sprint's intended customer. If Whidbey is barred from raising such a condition with respect to the requesting carrier, it follows as night the day that raising such a condition with respect to a carrier once removed also violates this rule, at least in principle.

25 Another violation of the requirement to negotiate in good faith, identified in 47 CFR §51.301(c)(2), is imposing a demand "that a requesting telecommunications carrier attest that an agreement complies with all provisions of the Act, federal regulations, or state law." Although Whidbey did not directly seek such an attestation, its professed concern in raising preconditions was to ensure Whidbey would not be entering into an ICA that might be, in some way, legally infirm or facilitate unlawful acts. Whidbey's particular focus was on state law that requires telecommunications companies to register with the Commission. Thus, Whidbey violated at least the spirit, if not the letter, of 47 CFR §51.301(c)(2).

26 In addition, when we consider all of the pertinent facts and circumstances in this record, particularly correspondence from Whidbey or its representative, Mr. Snyder, it appears to us that Whidbey intentionally obstructed and delayed negotiations relying on slim and transparently misleading arguments. This continued, if not amplified, even after Sprint filed its petition for arbitration.

27 Whidbey responded to Sprint's petition by filing a Motion for an Order of Dismissal for Lack of Jurisdiction (Motion to Dismiss). Whidbey's arguments in support of its motion are frivolous. In a nutshell, Whidbey argued:

- *Sprint's petition for arbitration was untimely.* To make this argument Whidbey measured the statutory timeframes for requesting arbitration from the date Sprint delivered to Whidbey a request for local number portability, not from the later date when Sprint delivered to Whidbey a request for interconnection. Whidbey's contention that the local number portability request was actually a request for interconnection because Sprint later agreed to resolve that request as part of the ICA process is an affront to principled argument.

- *Sprint's petition for arbitration was improperly served because it was delivered to Mr. Snyder, the outside counsel Whidbey previously had identified as the "point of contact" for purposes of negotiation of an ICA, rather than to Whidbey itself.* This argument is specious on its face.[18] The record in this proceeding shows that Mr. Snyder retained his status as point of contact for Whidbey at all relevant times.

- *Sprint's petition was improper because it was not verified, as required by WAC 480-07-630(8).* Whidbey simply ignores the plain and unambiguous language of the cited rule. It requires either an attorney's signature, which Sprint's petition bears, or a statement verifying that the facts are true and correct to the best of the signer's belief.

- *The Commission's jurisdiction to arbitrate can only be triggered by "voluntary negotiations."* There were no voluntary negotiations in this matter because Whidbey consistently refused to enter into them. Whidbey repeatedly raised barriers to forestall negotiation, including preconditions that are contrary to the FCC's rules, or the underlying principles supporting those rules, concerning minimum requirements for good faith negotiation. More blatant bootstrapping than this argument is difficult to conceive.

28 Even if Whidbey succeeded on any of its arguments, the only possible effect would be to delay the arbitration phase by another 135 days. This underscores the point that Whidbey's principal goal throughout this process appears to have been the frustration of Sprint's legitimate interest in interconnection to facilitate the entry of competitors into areas served by Whidbey.

29 As envisioned by the Telecommunications Act of 1996, the Commission must do its part to ensure that artificial barriers to entry of new services and new competitors are removed. This requires, among other things, that we make clear to incumbent carriers that we expect them to exhibit cooperative behavior at every stage of their commercial interactions with competitive carriers. That did not occur here. Although we decline to entertain sanctions for reasons previously discussed, we caution Whidbey to govern accordingly its future conduct.

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[18] We have no reason to doubt the technical accuracy of the sworn statements Mr. Snyder made in Attachment 4 to Whidbey's motion to dismiss, denying among other things his status as the company's registered agent. Nevertheless, it was Mr. Snyder to whom Sprint communicated, at Whidbey's direction, throughout the pre-arbitration phase of this matter.

ORDER

THE COMMISSION ORDERS:

30 (1) Whidbey Telephone Company's Petition for Interlocutory Review is denied.

31 (2) This arbitration is closed.

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

DATED at Olympia, Washington, and effective May 8, 2008.

WASHINGTON STATE UTILITIES AND TRANSPORTATION COMMISSION

MARK H. SIDRAN, Chairman

PATRICK J. OSHIE, Commissioner

PHILIP B. JONES, Commissioner

NOTICE TO PARTIES: This is a final order of the Commission. In addition to judicial review, administrative relief may be available through a petition for reconsideration, filed within 10 days of the service of this order pursuant to RCW 34.05.470 and WAC 480-07-850, or a petition for rehearing pursuant to RCW 80.04.200 or RCW 81.04.200 and WAC 480-07-870.