

BEFORE THE
WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

In the Matter of the Petition of Sprint)	
Communications Company L.P. for)	Docket No. UT-073031
Arbitration with Whidbey Telephone)	
Company)	MOTION OF WHIDBEY
)	TELEPHONE COMPANY
)	FOR AN ORDER OF DISMISSAL
)	FOR LACK OF JURISDICTION

1 COMES NOW Whidbey Telephone Company (“Whidbey”), by and through its attorney appearing herein for the limited purpose of challenging the jurisdiction of the Washington Utilities and Transportation Commission (“Commission”) in this matter, and respectfully moves the Commission for an Order dismissing for lack of jurisdiction the petition of Sprint Communications Company L.P. (“Sprint”) for arbitration, submitted for filing in this docket on October 17, 2007, (“Petition”).

1. Form of Request from Sprint.

2 On May 3, 2007, Whidbey received from Sprint a purported “bona fide request” for the provision by Whidbey of local number portability (“LNP”) pursuant to Section 52.23 of the rules of the Federal Communications Commission (“FCC”), 47 C.F.R. § 52.23, which was adopted by the FCC in furtherance of Section 251(b)(2) of the

Communications Act of 1934, as amended (the "Act"), 47 U.S.C. § 251(b)(2).¹

3 On May 11, 2007, Whidbey received from Sprint a request to negotiate an interconnection agreement purportedly pursuant to Sections 251(a) and 251(b) of the Act, 47 U.S.C. § 251(a) and (b). More specifically, Sprint's May 10, 2007, letter requested "an interconnection agreement which encompasses the carrier duties of: 251(a) direct and indirect interconnection, *251(b)(2) Number Portability*, 251(b)(3) Dialing Parity including directory listings, 251(b)(5) Reciprocal Compensation, and directory distribution." (Petition, Exhibit A (italics added).) The request for negotiation was accompanied by a copy of a "Discussion Draft" of an "Interconnection Agreement" (Petition, Exhibit B) and a copy of a proposed "Non-Disclosure Agreement" (Petition, Exhibit C). The discussion draft of an Interconnection Agreement bore the following legend on its title page,

"THIS DOCUMENT IS A DRAFT AND REPRESENTS THE CURRENT POSITIONS OF SPRINT WITH RESPECT TO INTERCONNECTION AND RESALE. SPRINT RESERVES THE RIGHT TO MODIFY THIS DRAFT AGREEMENT, INCLUDING ANY APPENDICES, SCHEDULES AND ATTACHMENTS AT ANY TIME PRIOR TO THE SIGNATURE OF THE FINAL AGREEMENT BY BOTH PARTIES. THIS DOCUMENT IS NOT AN OFFER."
(Emphasis added.)

4 The above-mentioned Discussion Draft of an Interconnection Agreement included a number of items that were either blank (*i.e.*, contents not supplied) or "to be determined," including the duration of the agreement (Section 1.1 of Petition, Exhibit B)

¹ First Memorandum Opinion and Order on Reconsideration in Telephone Number Portability, CC Docket No. 95-116, released March 11, 1997, 62 Fed. Reg. 18280 (1997) (FCC 97-74), at ¶1; First Report and Order and Further Notice of Proposed Rulemaking in Telephone Number Portability, CC Docket No. 95-116, released July 25, 1996, 61 Fed. Reg. 38605 (1996) (FCC 96-286), at ¶7.

and the compensation for transit traffic (Petition, Appendix I of Exhibit B). Sections 19.1 through 19.5 of the said draft Interconnection Agreement specifically, and in detail, addressed issues associated with the deployment of LNP. Subsequently, by letter dated July 27, 2007, a copy of which is attached to the Petition as Exhibit G thereto, Sprint confirmed that LNP was part of its request for negotiation of an interconnection agreement.

2. Delivery or Service of the Petition.

5 On October 17, 2007, Sprint submitted the Petition to the Commission for filing. As evidenced by the "Certificate of Service" that accompanied the Petition (a copy of which is attached hereto as "Whidbey Exhibit A"), a copy of the Petition was addressed to Robert S. Snyder, Law Offices of Robert S. Snyder, 1000 2nd Avenue, 30th Flr, Seattle, WA 98104. As stated in the Certificate of Service, the Petition was delivered to Mr. Snyder's offices on October 17, 2007. It does not appear that any copy of the Petition was delivered to Whidbey on October 17, 2007. (Whidbey Exhibit A; DeMartini Declaration,² ¶9.) This lack of delivery to or service on Whidbey is underscored by the Certificate of Service, dated the 24th day of October, 2007, reciting that the Petition was served on Whidbey by FedEx on October 24, 2007.³ This Certificate of Service is attached as Whidbey Exhibit B.

² Citations to "DeMartini Declaration" refer to the Declaration of Julia H. DeMartini, dated November 2, 2007, and filed herewith as Whidbey Exhibit C.

³ The October 24, 2007, Certificate of Service appears to be incorrect, in that while counsel for Sprint may have caused a copy of the Petition addressed to Whidbey to be deposited with Federal Express on October 24, such deposit does not constitute delivery or service under the Commission's rules. As evidenced by Federal Express proof of delivery, a package from Sprint's counsel addressed to Whidbey was received by Federal Express on October 24, 2007, and was not delivered to Whidbey until October 25, 2007, DeMartini Declaration, ¶9.

6

The day on which the Petition was submitted to the Commission for filing and delivered to Mr. Snyder's office was the 167th day after receipt by Whidbey of Sprint's request for LNP – the first portion of Sprint's request for interconnection. The Petition was submitted to the Commission for filing, and a copy of the Petition was delivered to Mr. Snyder's office, on the 159th day following the receipt by Whidbey of a request from Sprint to negotiate an interconnection agreement containing LNP and other terms (Whidbey Exhibit A).

3. Relationship of Sprint's Requests.

7

Sprint's purported bona fide request for LNP was transmitted to Whidbey by a letter from Sprint, dated May 2, 2007 (DeMartini Declaration ¶3, Exhibit 1). Whidbey initially responded to that communication from Sprint by letter, dated May 15, 2007 (DeMartini Declaration, ¶4; Exhibit 2). Further correspondence between Sprint and Whidbey then ensued, including a letter from Sprint, dated May 24, 2007, (DeMartini Declaration ¶5; Exhibit 3), a letter from Whidbey, dated June 5, 2007 (DeMartini Declaration, ¶6; Exhibit 4), a letter from Sprint, dated June 13, 2007 (DeMartini Declaration, ¶7; Exhibit 5), and a letter from Whidbey, dated July 6, 2007 (DeMartini Declaration, ¶8; Exhibit 6). In addition, by his letter, dated June 22, 2007, to Joseph P. Cowin, Esq. of Sprint (Petition, Exhibit F), Mr. Snyder inquired as to whether, inasmuch as Sprint appeared to be represented by Mr. Cowin with respect to Sprint's interconnection request, Mr. Snyder should direct his response to Ms. Danilov's June 13, 2007, letter to Mr. Cowin, or whether Mr. Cowin would consent to Mr. Snyder responding directly to Ms. Danilov (see Petition, Exhibit F, page 3). After a delay of more than a month, Mr. Cowin responded, in his letter of July 27, 2007, as follows:

“Finally, with respect to the request for local number portability, there is no need to respond to Ms. Danilov because Sprint will include the local number portability issue in the interconnection negotiations.” (Petition, Exhibit G, page 2.)

4. Lack of Verification on the Petition or Supporting Affidavit or Declaration.

8 As submitted to the Commission for filing on October 17, 2007, the Petition did not include, and was not accompanied by, any verification of any of its contents, nor was it supported by any affidavit or declaration.

STATEMENT OF ISSUES

9 The following issues are presented by this motion for determination:

10 (1) Does Sprint’s failure to deliver a copy of the Petition to Whidbey until October 25, 2007, mean that Sprint has failed to timely trigger the arbitration and, thus, the Commission lacks jurisdiction over Whidbey in this matter?

11 (2) Does the failure of Sprint to submit its Petition to the Commission for filing and deliver a copy thereof to Whidbey within 160 days after receipt by Whidbey of Sprint’s purported request for LNP mean that Sprint has failed to timely trigger the arbitration and, thus the Commission lacks jurisdiction over Whidbey to arbitrate any issues related to such LNP?

12 (3) Does Sprint’s failure to file a “verified” Petition, or a Petition accompanied by supporting affidavit or declaration, within the appropriate 160-day period constitute a failure by Sprint to file a petition for arbitration, as defined in the Commission’s rules, within

said 160 days, thereby failing to properly invoke the Commission's jurisdiction?

13

- (4) Should the Commission reject the Petition for filing, and, as a consequence thereof, dismiss this proceeding, including for lack of jurisdiction?

EVIDENCE RELIED UPON

14

This motion is based upon the Petition, the exhibits thereto, the declarations of Julia H. DeMartini and Robert Snyder, dated November 2, 2007, and November 1, 2007, respectively, and their respective exhibits, if any, filed herewith, and all other pleadings and other files herein.

ARGUMENT

Legal Framework

15

Section 252(b) of the Act confers upon State commissions⁴ the authority and responsibility to conduct arbitration proceedings in accordance with a time line specified therein. More specifically, Section 252(b) provides that during the period from the 135th day to the 160th day, both inclusive, after the receipt by the non-petitioning party of a request to negotiate an interconnection agreement, either party to the negotiation may petition the State commission to conduct arbitration proceedings with respect to the request for negotiations. Thus, as specified in Section 252(b)(1) of the Act, the arbitration proceeding is only commenced by the timely filing of a petition therefor with

⁴ "State commission" is defined in Section 153(41) of the Act, 47 U.S.C. § 153(31), as "the commission, board, or official (by whatever name designated) which under the laws of any State has regulatory jurisdiction with respect to intrastate operations of carriers."

the State commission. In addition, Section 252(b)(2) requires that not later than the day the petition is filed with the state utility regulatory commission, a copy thereof shall be provided by the petitioning party to the non-petitioning party.

16 The Commission has adopted WAC 480-07-630 to govern arbitration proceedings commenced pursuant to Section 252 of the Act. Subsection (4)(a) of that rule establishes the same timeline for the commencement of an arbitration proceeding as is set forth in Section 252(b), and includes the requirement that a copy of the petition be delivered to the non-petitioning party on the same day that the petition is filed with the Commission. What this means is that before the arbitration can be commenced, the Petition must be filed within the statutory time from (as recognized by the Commission's rule) and a copy of the Petition must be delivered to the non-petitioning party the same day it is filed with the Commission.

17 WAC 480-07-630(8) also includes the requirement that the petition be verified.

18 For the reasons discussed in greater detail below, based on these statutory and regulatory requirements, it is Whidbey's position that:

19 1) Sprint's Petition should be rejected under WAC 480-07-130 for failure to be filed as required by Commission rule for any or all of the following reasons:

- The Petition was not filed timely
- The Petition was not delivered to the non-petitioning party (Whidbey) in a timely fashion
- The Petition is not verified, or otherwise supported by affidavit or declaration, as required by Commission rule.

20

2) The Petition should be dismissed and this docket should be closed due to Sprint's failure to timely invoke the Commission's jurisdiction under Section 252(b) for any or all of the following reasons:

- The Petition was filed more than 160 days after the initial request for negotiated interconnection (the request for LNP) was delivered to Whidbey
- The Petition was not perfected due to Sprint's failure to timely deliver a copy of the Petition to the non-petitioning party (Whidbey)

21

3) Sprint's Petition raises issues not subject to arbitration.

1. **The Petition was Untimely and, thus, Fails to Invoke Commission Jurisdiction.**

22

As described above, Sprint's Petition was filed on the 167th day following its initial request for interconnection - specifically, the request for LNP. As the Exhibits demonstrate, the request for LNP was an integral part of Sprint's purported bona fide request to negotiate an interconnection agreement. Since the time periods for arbitration are "the 135th to 160th day (inclusive) after the date on which an incumbent local exchange carrier receives a request for negotiation under [Section 252]..."⁵ the October 17, 2007, date on which the Petition was submitted to the Commission for filing was the 167th day after the request. This renders the Petition untimely.

2. **Sprint's Failure to Deliver a Copy of the Petition to Whidbey Means Sprint Did Not Perfect its Filing and Failed to Invoke Commission Jurisdiction.**

23

As discussed above, WAC 480-07-630(6)(c) requires that a copy of the petition be

⁵ 47 U.S.C. §252(b).

delivered by the petitioning party to the non-petitioning party on the day the petition is filed with the Commission and Section 252(b)(2)(B) of the Act requires that the petitioning party provide a copy of the petition to the non-petitioning party not later than the date on which the State commission receives the petition. Sprint failed to comply with either of these requirements.

24

Delivery of a copy of the Petition to Mr. Snyder's offices did not constitute delivery to Whidbey. Mr. Snyder had not been designated by Whidbey to accept original process on Whidbey's behalf. (Snyder Declaration, ¶2-5.)⁶ In the letter, dated June 5, 2007, from Julia H. DeMartini, Vice President of Whidbey, to William Sanfillipo, Contracts Negotiator of Sprint, a copy of which is attached to the Petition as Exhibit D thereto, Ms. DeMartini designated Mr. Snyder as the "initial point of contact for the above-mentioned discussions and/or negotiations." Immediately following the designation of Mr. Snyder, Ms. DeMartini's letter went on to state,

"I would appreciate it if Sprint would furnish me with a copy of any correspondence from Sprint to Mr. Snyder relating to such discussions and/or negotiations." (Petition, Exhibit D, p. 3.)

and provided Ms. DeMaritini's address and e-mail address for such purpose. In addition, her letter further specified that all communications directed directly to Whidbey, and all notices pursuant to her letter addressed to Whidbey, should be sent to her attention. Petition, Exhibit D, p. 4. While Mr. Snyder is referenced as counsel for Whidbey, there is nothing that designates him as Whidbey's agent for Whidbey to receive

⁶ Citations herein to "Snyder Declaration" refer to the Declaration of Robert S. Snyder, dated November 1, 2007, and filed herewith as Whidbey Exhibit D.

service or delivery of the Petition. (Snyder Declaration, ¶2-5.) Clearly, Sprint did not comply with the requests and directives contained in Ms. DeMartini's June 5, 2007, letter,⁷ and the designation of Mr. Snyder by Whidbey as its initial point-of-contact did not constitute an appointment of him as agent for Whidbey for purposes of accepting service or delivery of documents required to be served upon, or delivered to, Whidbey.

25 The Commission's rules recognize the distinction between service upon a party and service upon a party's representative. WAC 480-07-150(3) provides, in part,

“The commission will serve orders in adjudicative proceedings upon the party's representative and also on the party.” (Emphasis added.)

Absent a designation of Mr. Snyder as Whidbey's agent for service of process or for purposes of accepting delivery of documents that are in the nature of original process, delivery to Mr. Snyder of a copy of the Petition did not constitute delivery of the Petition to Whidbey. The situation is no different from that which would obtain if Sprint had attempted to commence a proceeding in Superior Court and had failed to serve its summons and complaint upon the defendant, and had instead chosen to serve it upon a representative of the defendant who had been designated by the defendant as its point-of-contact for limited purposes only (not including acceptance of service or delivery of original process).

26 As a result of Sprint's failure to deliver or otherwise provide a copy of the Petition to Whidbey, as explicitly required by Section 252(b) of the Act and by WAC 480-07-

⁷ Ms. DeMartini's letter dated May 15, 2007, to Ms. Victoria Danilov of Sprint contained a similar instruction with respect to correspondence pertaining to LNP: “Please address future correspondence regarding this matter to my attention at Whidbey Telephone Company, 14888 SR 525, Langley, WA 98260.” (DeMartini Declaration, Exhibit 2, p. 2 of letter.)

360(c), Sprint both failed to fulfill a condition precedent to commencement of this action and also has failed to bring Whidbey within the Commission's jurisdiction for purposes of this proceeding. Accordingly, the proceeding should be dismissed for lack of jurisdiction.

3. **Sprint's Failure to Verify the Petition Means the Petition has Not Been Properly Filed and the Commission Lacks Jurisdiction as a Result.**

27

As noted above, Section 252(b) of the Act requires that in order for an arbitration proceeding to be timely commenced, a petition for arbitration must be filed with the state utility regulatory commission on or before Day 160 following the non-petitioning company's receipt of the request for negotiation. In the case of arbitration proceedings sought be commenced before the Commission, WAC 480-07-630 imposes requirements that define the attributes that a document needs to possess in order for it to be considered as a petition to commence an arbitration proceeding. Among the most important of these is the requirement in subsection (8) that the petition have been verified, or submitted by affidavit or declaration, at the time it is submitted to the Commission for filing:

"(8) Verification. The petition, answer, and all documentation must be verified as provided by WAC 480-07-395, or submitted by affidavit or declaration."

Under WAC 480-07-397(2), verification is provided by including "a statement ...that the facts asserted in the pleading are true and correct to the best of the signor's belief." The verification requirement set forth in WAC 480-07-630(8) does not allow an attorney's signature to be a substitute for verification. Rather, WAC 480-07-630(8) provides, in lieu of attorney signature, the choice of an affidavit or declaration. Substantially these same requirements, as applied to the non-petitioning party's response to the Petition, are recognized in Paragraph 10 of Order 01, dated October 26, 2007 (Service Date: October

29, 2007), in this proceeding.⁸ The Sprint Petition did not include a verification by Sprint that the pleadings are true and correct to the best of Sprint's belief. Nor was the Petition submitted by declaration or affidavit.

28 Without verification, or submission by affidavit or declaration, the document fails to include at least one of the constituent elements that would render it a petition for arbitration, and lacking such element, the Commission should rule that it does not comprise a petition for arbitration as contemplated by the Commission's rules implementing Section 252(b) of the Act.

29 If a proper petition for arbitration, including the required verification or supporting declaration or affidavit, is not timely and properly filed with the Commission, the failure should be held by the Commission to be jurisdictional, and the proceeding by which it purportedly was commenced should be dismissed for lack of jurisdiction. Accordingly, this proceeding should be dismissed for lack of jurisdiction by reason of the material deficiency in the Petition resulting from the lack of verification, or accompanying affidavit or declaration. Alternatively, the Petition should be rejected for filing pursuant to WAC 480-07-141 because of these deficiencies, and subsequent to such rejection, this proceeding be dismissed, including for lack of jurisdiction. This result should obtain, regardless of whether or not the absence of a verification of the Petition, or accompanying affidavit or declaration, was intentional or a mere oversight, since under Section 252(b) of the Act, timely filing of a petition for arbitration is jurisdictional.

⁸ Order on Arbitration Procedure; Appointment of Arbitrator; Notice of Prehearing Conference ("Order 01"). For reasons that are not readily apparent, Order 01 does not provide for submission by declaration as an alternative for submission by affidavit.

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The issue of verification is not one of form over substance. In this instance, it appears that the absence of a verification or accompanying declaration or affidavit is other than an oversight, since, the Petition, as submitted to the Commission for filing, could not properly have been verified or otherwise submitted under affidavit or declaration. The reason for this is simple. Under WAC 480-07-630, the submission of a petition for arbitration to the Commission includes at least two implied representations, each of which in this instance was untrue.

31

First, WAC 480-07-630(5)(f) requires that a petition for arbitration be accompanied by all relevant documents. The same requirement is included in Section 252(b) of the Act. Second, WAC 480-07-630(5)(f)(i) requires that a petition for arbitration be accompanied by a copy of the most recent version of any proposed interconnection agreement, and that in such copy, agreed matter be shown in standard type and disputed provisions be shown in bold type. By submitting the Petition for filing and not expressly identifying that it was not complying with these provisions, Sprint impliedly represented to the Commission that it had included all relevant documents and that Whidbey had not communicated to Sprint any disagreement with the content of any of the provisions contained in the form of interconnection agreement that accompanied the Petition, since none of the provisions of the interconnection agreement that accompanied the Petition was set out in bold type.

32

As noted above, one of the significant elements of Sprint's request to negotiate an interconnection agreement was Sprint's request for LNP pursuant to Section 251(b)(2) of the Act. Substantial correspondence was exchanged between Sprint and Whidbey related to this issue. DeMartini Declaration, ¶3-8. This exchange of correspondence made it

clear that Whidbey was not in agreement with Sprint on issues related to the deployment of LNP, and thus, did not agree with the resolution of LNP issues reflected in the “discussion draft” of the Interconnection Agreement that accompanied Sprint’s request to Whidbey for negotiation of an interconnection agreement. However, Sprint’s Petition implies Whidbey is in agreement with the “discussion draft” since no disagreement is shown.

33 Similarly, the second paragraph under the heading “BACKGROUND” on page 1 of the “discussion draft” of the Interconnection Agreement that accompanied Sprint’s request to Whidbey for negotiation of an interconnection agreement stated, “ILEC is an incumbent local exchange carrier (“ILEC”) and Sprint is a telecommunications carrier.” (Emphasis added.) However, in the correspondence that had been sent on behalf of Whidbey in response to Sprint in response to Sprint’s request to negotiate an interconnection agreement, it was made abundantly clear that, in the context of Sprint’s request, Whidbey was not able to agree that Sprint was a “telecommunications carrier,” as that term was used in the Act. For example, in a letter, dated June 22, 2007, to Joseph P. Cowin, Senior counsel for Sprint, from Robert S. Snyder, Mr. Snyder wrote,

 “The second threshold issue is whether, insofar as the present context is concerned, Sprint is a “telecommunications carrier,” since only telecommunications carriers are entitled to interconnection under subsection 251(a) of the Act.” See Petition, Ex. F, p. 2.

34 Similarly, in a letter, dated August 10, 2007, to Jeffrey M. Pfaff, Senior Counsel for Sprint and one of the attorneys for Sprint whose name is subscribed on the Petition, Mr. Snyder wrote,

 “With respect to the issue of whether wholesale providers are telecommunications carriers under Section 251 of the Act, I do not read

the FCC Order⁹ as holding that ‘all’ wholesale service providers are ‘telecommunications carriers,’ but rather as recognizing that only those wholesale providers that are, in fact, providing telecommunications services as common carriers are included within the term ‘telecommunications carriers.’¹⁰ The FCC Order includes a substantial discussion of the tests that must be satisfied for a service provider to be a common carrier, and it is that discussion which gave rise to one of the threshold issues raised by Whidbey – namely, that it appears that, in its relationship with its wholesale customer in this instance, Sprint is not acting as a ‘common carrier.’ If it is not acting as a common carrier, it is not eligible to exercise rights under Sections 251(a) and (b) of the Act.” See Petition, Ex. I, p. 2.

Notwithstanding this substantial discussion of Whidbey’s inability to agree that Sprint was a “telecommunications carrier” insofar as may be relevant to the present matter, Sprint failed to identify that issue as being in dispute by appropriately displaying in bold type the portion of the interconnection agreement that was affected by that issue.

35

In light of these serious omissions from Sprint’s Petition, Sprint could not truthfully have verified the Petition or submitted it under affidavit or declaration. Moreover, the very first paragraph of the Petition contains a statement that is patently untrue: “Whidbey has not identified any disputed issues that it has with Sprint’s proposed agreement, instead taking the position of refusing to negotiate at all, based upon a baseless claim that Sprint is not entitled to interconnection.” (Petition, ¶1.) There are at least three respects in which this sentence is false. First, as pointed out above, Whidbey had clearly identified disputed issues with Sprint’s discussion draft interconnection agreement.

⁹ References to the “FCC Order” in this quoted passage refer to the Memorandum Opinion and Order, released March 1, 2007, by the Chief of the FCC Wireline Competition Bureau, in WC Docket No. 06-55, DA 07-709 (Petition, Ex. H). [Footnote not in original.]

¹⁰ See Petition, Ex. H, ¶ 16, “. . . we make clear that the scope of our declaratory ruling is limited to wholesale carriers that are acting as telecommunications carrier [*sic*] for purposes of their interconnection request.” [Footnote not in original.]

Second, as discussed more fully under Footnote 12 below, Whidbey did not “refuse to negotiate at all;” indeed, Whidbey stated its willingness to engage in negotiations/discussions and sought to have a meaningful dialog with Sprint regarding the threshold issues that Whidbey had identified as needing to be resolved. Third, Whidbey did not claim that Sprint either was or was not entitled to interconnection, but rather identified threshold issues that needed to be addressed in order to determine whether or not Sprint was so entitled; given the detail with which they were set forth and their foundation in FCC decision and the law of the State of Washington, those issues could hardly be accurately characterized as “baseless.” These circumstances all strongly suggest that the omission of the verification from the Petition (or not submitting it to the Commission under declaration or affidavit) was not inadvertent.

4. **Sprint’s Request for Negotiation of an Interconnection Agreement is Not Subject to Arbitration by the Commission.**¹¹

36 The Commission’s legal authority to conduct the arbitration sought by the Petition arises solely by reason of the delegation to the Commission of authority under Section 252 (b) of the Act. Section 252(b)(1) provides, in relevant part, that it applies only with respect to negotiations commenced “under this section:”

“During the period from the 135th day to the 160th day (inclusive) after the date on which an incumbent local exchange carrier receives a request for negotiation under this section, the carrier or any other party to the negotiation may petition a State commission to arbitrate any open issues.” (Emphasis added.)

¹¹ In advancing this argument, Whidbey is not unmindful of the Commission’s Third Supplemental Order Confirming Jurisdiction in Docket No. UT-023043, an arbitration proceeding. However, such decisions are binding only upon the parties to the arbitration. WAC 480-07-630(2). Further, Whidbey believes the decision reached in that arbitration proceeding, as it pertains to this issue, was in error. Finally, Whidbey recognizes that this issue need not be reached if the Commission resolves this Motion in Whidbey’s favor on any of the grounds discussed earlier.

The only negotiations “under this section” are those contemplated by Section 252(a)(1) and those to which Section 252 is made applicable by virtue of Section 251(c).

37 Section 252(a)(1) is entitled “Voluntary negotiations,” and pertains to negotiations that are permissible, but not required. Section 252(a)(1) authorizes an incumbent local exchange carrier to “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.” Section 251(a)(1).

38 The only other negotiations under Section 252 are those made subject to Section 252 by Section 251(c)(1) of the Act. Section 251 reads, in relevant part, as follows:

In addition to the duties contained in subsection (b) of this section, each incumbent local exchange carrier has the following duties:

39 “(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.”

40 Finally, in the context of this issue, it is important to recognize that Sections 251(a) and 251(b), impose specific requirements upon telecommunications carriers, but do not require that they enter into any binding agreement with respect to those requirements. Binding agreements only arise either voluntarily, pursuant to Section 252(a) or pursuant to the duty to negotiate that is set forth in Section 251(c). However, Whidbey is exempt from Section 251(c) by reason of Section 251(f)(1) of the Act. With respect to voluntary negotiations under Section 252(a), Whidbey has manifested its willingness to enter into

such negotiations, subject to two threshold issues being adequately addressed.¹² Those threshold issues are whether, with respect to Whidbey's service area for which Sprint has requested negotiations, Sprint is a "telecommunications carrier" within the meaning of the Act, and whether Sprint's principal, if not only, intended use for the requested interconnection would be unlawful under the laws of the State of Washington, thereby causing Whidbey to aid or abet such unlawful activity, in contravention of Title 80 RCW.

41 In the absence of voluntary negotiations having been undertaken pursuant to Section 252(a), the conditions precedent to the Commission having jurisdiction to conduct an arbitration have not occurred, and, as a result, the Commission lacks jurisdiction to entertain the Petition and lacks jurisdiction to order Whidbey to enter into any particular form of agreement regarding interconnection with Sprint.

¹² For example, Mr. Snyder's letter, dated June 22, 2007, on behalf of Whidbey to Sprint, states in part:

"It appears to Whidbey that there are two threshold issues that need to be resolved before discussions or negotiations between Sprint and Whidbey looking toward 'local' interconnection or exchange of local traffic between Sprint and Whidbey can proceed, because they go [to] the heart of the issue of whether Sprint is entitled to seek interconnection under subsection 251(a) of the Act." (Petition, Exhibit F, p. 2.)

Similarly, Mr. Snyder's letter, dated August 10, 2007, on behalf of Whidbey to Sprint states in part:

"Whidbey is committed to fulfilling its obligations under Sections 251(a) and (b) of the Communications Act of 1934, as amended, and remains receptive to bona fide requests for interconnection from telecommunications common carriers eligible to submit them, where those requests do not have an unlawful purpose or effect. Whidbey would be willing to enter into an appropriate non-disclosure agreement with Sprint if Sprint is willing to address in a substantive and meaningful way the threshold issues that Whidbey has raised, and would be willing to proceed with non-Section 251(c) discussions/negotiations with Sprint regarding Section 251(a) and (b) matters, if it were to appear from such information as Sprint may choose to furnish in response to those threshold issues that Whidbey's concerns are misplaced and that Sprint is eligible to submit the subject requests for interconnection and LNP in the South Whidbey rate center." (Petition, Ex. I, p. 4.)

CONCLUSION

42 For the foregoing reasons, Whidbey respectfully requests that the Commission reject the Petition for filing, and, regardless of whether or not the Petition is rejected for filing, dismiss this proceeding for lack of jurisdiction.

Dated: November 2, 2007.

Respectfully submitted,



Richard A. Finnigan, WSBA #6443
Attorney for Whidbey Telephone Company
Law Office of Richard A. Finnigan
2112 Black Lake Blvd SW
Olympia, WA 98512
Tel. (360) 956-7001
Fax (360) 753-6862