ATTACHMENT 3

BEFORE THE WASHINGTON
UTILITIES AND TRANSPORTATION COMMISION

DOCKET NO. UT-073031

STATEMENT OF POSITIONS OF
WHIDBEY TELEPHONE COMPANY
REGARDING
DRAFT AGREEMENT FOR LOCAL INTERCONNECTION
AND LOCAL TRAFFIC EXCHANGE
BY AND BETWEEN SPRINT COMMUNICATIONS COMPANY L.P.
AND
WHIDEY TELEPHONE COMPANY

Introduction

This statement of positions ("Statement") is respectfully submitted on behalf of Whidbey Telephone Company ("Whidbey") pursuant to WAC 480-07-360(7)(b) and supplements the Legal Brief on behalf of Whidbey that accompanies Whidbey's Answer, filed herewith, to the petition of Sprint Communications Company L.P. for arbitration ("Petition"), which petition was submitted to the Commission for filing on October 17, 2007.

WAC 480-07-360(7)(b) identifies the following as one of items that an answer to a petition filed under WAC 480-07-360 must do:[1]

> "Include a brief statement of each unresolved issue and a summary of each party's position with respect to each issue."

As Sprint has pointed out, there has been no substantive discussion between the Parties as to the wording of any of the sections of the contemplated interconnection agreement ("Agreement"). While it is known that there is disagreement between Sprint and

[1] As with all other portions of Whidbey's Answer, this Statement is furnished without prejudice to, or waiver of, Whidbey's position that Sprint's petition should be rejected for filing or dismissed.

Whidbey regarding certain concepts that are embedded in the Agreement, because of Sprint's general failure to respond to issues that Whidbey has raised, for the most part Whidbey does not know Sprint's position with respect to the modifications to the draft Agreement that Whidbey proposes.

The draft of the Agreement that accompanies this Statement is based upon the discussion draft Interconnection Agreement that accompanied Sprint's letter, dated May 10, 2007, to Whidbey (Petition, Ex. A). Two versions of Whidbey's proposed draft of the Agreement accompany this Statement – a "clean" version and a "redlined" version. The "redlined" version has been generated by applying Microsoft Word's "compare" utility to Whidbey's revised "clean" draft and comparing it with the electronic Word file received by Whidbey from Sprint by e-mail on June 14, 2007. The "redlined" version is being furnished in lieu of using bold typeface to indicate unresolved issues, in the belief that it will be more helpful in facilitating resolution of those differences. Moreover, because of the number of provisions as to which at least some modification has been incorporated into the Whidbey draft of the Agreement, most of the Agreement would be in bold typeface. Nevertheless, if the Commission would like Whidbey to file a copy of its form of the draft Agreement, with bold typeface having been applied to those portions of the Agreement as to which the parties are not known to be in accord, Whidbey will do so promptly upon Commission request.

The accompanying "redlined" version of the Agreement generally shows changes in wording proposed by Whidbey. Some of those changes are in the interest of improved contract drafting, while others reflect what appear to be significant policy

differences. The purpose of this Statement is to articulate briefly Whidbey's position with respect to a number of those apparent policy differences.

It is also to be noted that the accompanying draft Agreement is just that – a draft. The Agreement covers a number of subjects, many of which have multiple layers of detail. Notwithstanding that Whidbey is a telecommunications carrier that is nearly 100 years old, it has varying degrees of familiarity with the issues addressed by the Agreement; some of the issues are either new to Whidbey or involve levels of detail that Whidbey, as a relatively small rural telephone company, has not previously had occasion to investigate in detail and analyze. For example, the draft Agreement contemplates that the parties will have the capability of "measuring" the Traffic they exchange. Whidbey has not previously had occasion to deploy such measurement capabilities with respect to "local" Traffic on an on-going basis, and therefore has had to investigate the capability of its switching platform(s) to perform such measurement. If the Petition is not dismissed as Whidbey has requested, then as this proceeding moves forward and in light of the technical and legal complexity of some of the issues, Whidbey may wish to submit further modifications to the draft Agreement, and, accordingly, to the maximum permissible extent, it respectfully reserves the right to do so.

In addition, it is unclear at this juncture whether some of the provisions proposed by Sprint in the draft Agreement are to remain in the Agreement. Their inclusion in the Agreement depends, at least in part, upon rulings to be made by the Commission. Accordingly, Whidbey has left in the accompanying draft Agreement some sections that it believes likely should be deleted. These are surrounded by braces, that is the symbols { and }. Changes to the wording of those sections, if they are to remain in

the Agreement, are shown with redlining in the accompanying redlined version of the draft Agreement, and are incorporated into the "clean" version of the accompanying draft Agreement. Upon review, Whidbey has noticed that there are some internal references in the Whidbey draft that are inconsistent in numbering. However, there is not sufficient time to correct the references. Most should be self-evident. Whidbey will provide a corrected version in the near future.

Lastly, in a number of locations, the draft Agreement includes references to "industry standards," "industry guidelines," "accepted industry practice," and "standard technical specifications." These references continue to appear in the accompanying clean and redlined drafts of the Agreement, although Whidbey believes that at a minimum, "safe harbor" standards, guidelines, practices and specifications should be set forth, or incorporated by reference, with greater particularity and specificity where these references appear.

Section-by-Section Statements of Position

Title Page

The legend should be removed prior to signature.

The title of the Agreement has been modified to reflect more accurately the subject matter of the Agreement.

Table of Contents

The Table of Contents should be conformed to the Agreement, as revised and prepared for signature.

Introductory Paragraph (page 1)

Identifying information has been supplied for Whidbey.

Background Section

Whidbey proposes to make clear that the Agreement is entered into pursuant to only certain specified subsections of Sections 251 and 252 of the Communications Act of 1934, as amended (the "Act"), excluding specifically subsection 251(c). Also, Whidbey proposes to delete the reference to the Telecommunications Act of 1996, since the manner in which it appears as proposed by Sprint creates an ambiguity as to whether amendments other than the Telecommunications Act of 1996 are also to be given cognizance.

Whidbey proposes that its "rural exemption" be explicitly recognized, and that it be made clear that the Agreement does not adversely affect any of Whidbey's rights or privileges arising under Section 251(f)(1) or 251(f)(2) of the Act.

Whidbey also propose that it be identified as a "rural telephone company" (as defined in the Act, rather than as an "incumbent local exchange carrier," since the definition of "rural telephone company" in Section 153(37) of the Act includes its being an "incumbent local exchange carrier.

Section 1.1

Whidbey proposes that the Agreement have an initial term of two (2) years, and that it thereafter renew for successive periods of one (1) year each. Sprint has not made any proposal to Whidbey as to the length of either the initial term of the Agreement or any renewal period for the Agreement.

Section 1.2

This section provides certain opportunities to require renegotiation of the Agreement. Sprint has proposed that such opportunities be available only to Sprint, and not to Whidbey. Whidbey proposes that they be available reciprocally to both Parties.

Section 1.3

This section provides certain opportunities to terminate the Agreement. Sprint has proposed that such opportunities be available only to Sprint, and not to Whidbey. Whidbey proposes that they be available reciprocally to both Parties.

Also, this Section provides that renegotiation of the Agreement shall be subject to mediation or arbitration under Section 252 of the Act. Whidbey does not agree that mediation or arbitration under Section 252 of the Act applies. The applicability of the arbitration provisions of Section 252 of the Act to this proposed Agreement is an issue that is currently before the Commission. Accordingly, Whidbey proposes that this Section be modified to recognize the possibility that Section 252 may not apply.

Sections 2.1 and 2.2 (Section 2.1 in the Sprint draft)

It is Whidbey's understanding, and thus its position, that, except for Local Number Portability ("LNP") provisions, the Agreement applies only to interconnection and the exchange of Traffic that both originates and terminates in the South Whidbey Exchange. Sprint has not requested other interconnection or local traffic exchange, so the Agreement has been modified to reflect the intent of the Parties, as Whidbey understands it to have been. Also, since Sprint did not request interconnection other than with respect to the South Whidbey Exchange, even if this arbitration has been properly commenced and the Commission has jurisdiction over it, it does not extend beyond the South Whidbey Exchange, since Sprint's original request to negotiate an interconnection agreement did not extend beyond the South Whidbey Exchange.

Section 2.2 makes provision for certain rights to provide retail services or wholesale service, including voice over internet protocol ("VoIP") services. Sprint has proposed that such rights be conferred by the Agreement only upon Sprint. Whidbey proposes that they be conferred upon both Parties.

Also, Sprint proposes in Section 2.2 that certain traffic be treated as Sprint Traffic, but does not propose corresponding treatment for Whidbey Traffic. Whidbey proposes that these provisions be made reciprocal.

Section 3.1

In Sprint's draft of the Agreement, the definitions would apply to "all sections" contained in the Agreement. Since the Background paragraphs are not denominated as "sections," but some defined terms are used in them, this Section has been modified by Whidbey to extend the definitions to "all provisions" of the Agreement.

Also, Sprint refers proposes a hierarchy of definitions, starting with definitions set forth in the Agreement, then definitions in the Act, then normal usage in the telecommunications industry. This hierarchy ignores the definitions in Part 51 of the FCC's rules relating to interconnection, as well as the definitions in Part 52 of the FCC's rules relating to LNP. Whidbey proposes that the Agreement refer to the definitions in Parts 51 and 52 of the FCC's rules apply to the extent applicable, in the absence of a specific definition in the Agreement or the Act.

Section 3.3

Whidbey proposes adding a definition of "Affiliate," since the term is used elsewhere in the Agreement.

Section 3.4

As proposed by Sprint, this section used the term "information services traffic" as an undefined term. Whidbey proposes that it be used as a defined term, and has added else a definition of the term.

Section 3.5

Whidbey proposes adding a definition of Commercial Mobile Radio Service ("CMRS"), since the term is used elsewhere in Whidbey's proposed draft of the Agreement.

Section 3.6

Whidbey proposes that the definition of the term "Commission" be particularized to the Washington Utilities and Transportation Commission.

Section 3.7

Whidbey proposes that the definition of "EAS Traffic" be made more specific and granular, and to put to rest any question, at least as of the date of the Agreement, as to whether any Traffic is or is not EAS Traffic.

Section 3.8

Whidbey proposes that geographical attributes be added to the definition of "End User" consistent with the scope of the Agreement.

Section 3.9

Whidbey proposes to make it clearer that the definition of EAS is limited to EAS between the South Whidbey Exchange and other local service exchange areas of ILEC, as distinguished from local service exchange areas of other incumbent local exchange carriers.

Section 3.10

Whidbey proposes to add a definition of "Information Services" consistent with the Act's definition of information service, so as to define an essential element of the term "Information Services Traffic," which is defined in Section 3.11.

Section 3.11

As proposed by Sprint, the Agreement referred to information services. Whidbey believes that a defined term of "Information Services Traffic" should be added to the Agreement, to facilitate treatment of such Traffic in the Agreement.

Section 3.13

Whidbey proposes limiting the definition of Interconnection Facility to reflect the Traffic that may be passed over that facility. This includes allowing the Interconnection Facility to be used to pass Information Services Traffic, but only if the Interconnection Facility is

also used to pass Telecommunications Traffic. This is consistent with Section 51.100(2)(b) of the FCC's rules, 47 C.F.R. § 51.100(2)(b).

Section 3.19

Whidbey proposes that the definition of Telecommunications Traffic be refined (i) to reflect the priority of the Act's definition of Telecommunications Traffic over the definition contained in the FCC's rules, and (ii) to exclude Wireless Traffic that may be subject to another agreement between Sprint, or any Affiliate of Sprint, and Whidbey, since Sprint Nextel is a major provider of wireless service (CMRS).

Section 4.1

Among the changes proposed by Whidbey to this section is modification of the interest rate that would apply to delinquent amounts. As proposed by Sprint, the interest rate appears to have no upper limit, since, as Sprint has proposed it, the applicable rate of interest would be the highest rate permitted by law. Since it is Whidbey's understanding that there is no limit under the laws of the State of Washington on the rate of interest that may be charged with respect to commercial indebtedness, Sprint's proposed formulation would appear to leave the applicable rate of interest essentially undefined. Whidbey's proposed draft cures this problem by defining an upper limit to the applicable rate of interest.

Section 5.1

This section pertains to audit rights. Because Sprint is proposing to use Services furnished under the Agreement to provide wholesale services to other carriers, Whidbey believes that in order for the audit rights to be effective and truly reciprocal, Whidbey's audit rights must extend to Sprint's wholesale customers. This provision has been modified by Whidbey to so provide.

Section 6.3

Because of Whidbey's concerns regarding the potential unlawful use of service by Sprint, or by Sprint's wholesale customers, Whidbey believes that any limitation on liability should not extend to liability that a Party might have by reason of exposing the other Party to harm as a result of such unlawful use. Accordingly, among the changes proposed by Whidbey to this section is a change to carve out such circumstances from the Agreement's limitation on liability. It is also Whidbey's position that the limitation of liability should not apply to indemnification with respect to third-party claims.

Sections 7.2 and 7.3

These sections have been added to the Agreement to address the threshold concerns that Whidbey has set forth regarding (i) Sprint's apparent intention to provide service to a telecommunications company that does not appear to be properly registered with the

Commission and (ii) Sprint's apparent lack of qualification as a "telecommunications carrier" with respect to the services that Sprint is seeking from Whidbey in this matter. Given the circumstances, Whidbey believes that these provisions are essential if Whidbey is ordered to enter into the subject Interconnection Agreement with Sprint.

Section 8.1

Sprint has proposed reciprocal indemnification. Whidbey has modified the draft Agreement to make clear that such reciprocal right to indemnification extends not only to the Parties, but also to their respective officers, directors, trustees, employees, attorneys, agents and representatives.

Whidbey also proposes to extend the indemnification provisions of this section to cover any breach of any representation or warranty set forth in Section 7 of the Agreement.

Also, Sprint's draft of this section would require the Indemnified Party to accept defense by the Indemnifying Party. Whidbey proposes that a Party have the option of defending itself.

Section 8.2

Whidbey proposes modifications to this section to accommodate circumstances where the Indemnified Party provides its own defense against a claim with respect to which it is entitled to indemnification by the other Party.

Section 10.1

Sprint has proposed that Confidential Information shall not be distributed, disclosed or disseminated to anyone other than employees and duly authorized agents of the Parties who "shall be bound by the terms of this Section." Whidbey proposes that, rather than requiring that such employees and agents be bound by the terms of this Section, that it shall be sufficient if such employees and agents are bound by obligations of confidentiality and non-disclosure no less restrictive than the terms of this Section. This change obviates what would otherwise seem to be a requirement for the Parties to obtain new confidentiality and non-disclosure agreements with their relevant employees and agents.

As proposed by Sprint, this Section also would not appear to permit the use of Confidential Information in connection with any legal proceeding relating to the Agreement or relating to any renegotiation or modification of the Agreement, or any successor to the Agreement. Confidential Information may be highly relevant to the reason for renegotiation or modification of the Agreement being sought, and a Party should not be prevented from using such information in justifying the need for, or resisting, such renegotiation or modification. Accordingly, Whidbey proposes a modification to the Agreement to permit the use of Confidential Information for such purposes, including mediation and/or arbitration, if applicable.

Section 10.2

As proposed by Sprint, this section would require a Party receiving a lawfully compelling request to disclose Confidential Information to give notice of such to the other Party, to refrain from such disclosure until such other Party had had an opportunity to seek a protective order, and to cooperate such other Party's efforts to obtain a protective order. Whidbey proposes that this section be modified to accommodate circumstances where disclosure of the request for the disclosure of Confidential Information is prohibited by law or applicable governmental order.

Section 12.2

As proposed by Sprint, this section would generally require that the Parties attempt to resolve disputes through a two-stage effort, consisting of a 30-day first stage, and then a second stage of indeterminate length, before other remedies could be pursued. As so proposed, the second stage would require escalation to "a designated representative who has authority to settle the dispute and who is at a higher level of management than the persons with direct responsibility for administration of this Agreement." That escalation requirement assumes a corporate structure that may be common in larger entities, such as Sprint, but that is not necessarily well-suited to the allocation of responsibilities within a smaller entity, such as Whidbey. Accordingly, Whidbey proposes that the two stages of negotiation be combined into one, with a combined minimum duration of sixty (60) Days, and without prescribed escalation. The responsibility would be upon each party to negotiate in good faith; how it might best fulfill that responsibility should be for it to determine.

Section 12.4

As proposed by Sprint, the Agreement appear to lack a "venue" or "choice of forum" provision. Whidbey proposes designated jurisdiction and forum location in King County Washington, or as close to Seattle, Washington as can be achieved. As proposed by Whidbey, this section also includes an agreement to *in personam* jurisdiction of the designated courts, provided that original process is properly served.

Section 13.3

Whidbey proposes adding to this section an obligation, upon request, to defend, as well as to indemnify and hold harmless. Sprint's proposal omits the obligation to defend.

Section 13.6

As proposed by Sprint, this section requires a 30-day period of forbearance in the event of a breach of the Agreement or violation of law, before dispute resolution or other remedies could be pursued. Consistent with one of the threshold issues that Whidbey has raised, Whidbey proposes that there be no such requirement of forbearance if such

forbearance would expose the non-breaching or non-violating Party, or any of its officers, directors, trustees, employees, attorneys, agents or representatives to be at risk for civil damages or penalties or criminal sanctions.

Section 13.9

Consistent with the clarification of the persons and entities entitled to indemnification, being held harmless and defense, Whidbey proposes that this section be modified to make clear that such persons and entities are third-party beneficiaries of the Agreement. Sprint's proposed version of this section would arguably preclude such persons or entities from having such rights.

Section 13.13

Whidbey proposes a number of modifications to the provision of the Agreement regarding assignment, principally to make clear that in any assignment or transfer, the rights and obligations of the assigning or transferring Party cannot become splintered, requiring that the assignee or transferee affirmatively assume the rights and obligations that are being transferred or assigned, providing for the survival of the assigning or transferring Party's liability for pre-assignment obligations, and providing for the survival of defenses that could have been asserted by the non-assigning or non-transferring Party against the assignee or transferee. Sprint's proposed version of the Agreement would appear to permit the rights and obligations of a Party to become separated from one another and otherwise splintered, does not require an affirmative assumption by the assignee or transferee, and does not address the survival of obligations and defenses in the event of a transfer or assignment.

Section 14

Most, if not all, of the changes proposed by Whidbey to this section are self-explanatory. In general, Whidbey proposes that the POI be in the South Whidbey Exchange. It is Whidbey's position that if a telecommunications carrier wishes to provide local service in an exchange, it is that carrier's responsibility, at its cost, to extend its network to that exchange (by its own facilities or by facilities obtained from others), so as to carry to and from that exchange Traffic that originates from, and is to terminate in, that exchange if such carriage is necessary under its network design. It appears to be Sprint's position that if a new entrant chooses to provide local service in an exchange from a switching entity that is distant from the exchange that is to be served, the carrier that has facilities physically present in the served exchange should bear some of the cost of transport (outside the served exchange) to reach the other carrier's distant network. Whidbey is especially concerned about this issue, since despite its repeated requests to Sprint for identification of the switching entity or entities to which Sprint would want Whidbey's South Whidbey Rate Center numbers to be ported, Sprint has consistently failed to disclose the identity or location of the switching facilities it intends to use to serve the South Whidbey Exchange or South Whidbey Rate Center.

Also, Sprint proposes that it be permitted to designate where it would interconnect with Whidbey's facilities, and to dictate to Whidbey where Whidbey would connect with Sprint's facilities. Whidbey proposes that the points of interconnection (POIs) be at points that are technically feasible and mutually agreeable within the South Whidbey Exchange. To the extent that Sprint's position is that Sprint has a "right" to connect with Whidbey's facilities at any technically feasible point, Sprint would appear to be relying upon rights, if they were otherwise to be applicable, that arise pursuant to Section 251(c) of the Act (see Section 251(c)(2)(B)), and from which Whidbey is exempt by reason of Section 251(f)(1) of the Act. (Sprint's proposal appears to be designed to be used with incumbent local exchange carriers that are not exempt from the obligations of Section 251(c).) Since Whidbey is exempt from Section 251(c) of the Act, Whidbey's obligation under the Act is to accommodate interconnection, but it is Whidbey's understanding that it is not required by the Act to allow Sprint, or any other carrier, to designate unilaterally the POI. See, generally, First Report and Order, *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, CC Docket No. 96-98, released August 8, 1996, (61 Fed. Reg. 45476 (Aug. 29, 1996)) (FCC 96-325), at ¶ 549; 47 C.F.R. § 51.305(2).

From Sprint's draft of the Agreement, it appears to be Sprint's position that it has a right to connect on Whidbey's network. To the extent that such a right might otherwise exist, it is Whidbey's position that such right, if any, arises only pursuant to Section 251(c) of the Act (see Section 251(c)(2)(b)), from which Whidbey is exempt by reason of Section 251(f)(1) of the Act. Thus, in Whidbey's draft of the Agreement, the POI may be at a point adjacent to Whidbey's network, rather than "on" Whidbey's network.

Section 14

Whidbey proposes adding Section 14.2.4 to the Agreement to make clear that the Agreement does not confer upon Sprint any collocation rights. To the extent that the Act provides for collocation rights, those rights arise pursuant to Section 251(c) of the Act (see Section 251(c)(6)), from which Whidbey is exempt by reason of Section 251(f)(1) of the Act.

Section 15

As proposed by Sprint, the Agreement appeared to contemplate that Sprint could route Traffic through Whidbey as a transiting carrier. Whidbey's position is that such a role is beyond the scope of Sprint's request for negotiation of an interconnection agreement. Accordingly, Whidbey proposes that the provisions contained within this section be deleted. If transiting relationships are to be treated in the Agreement, Sprint's proposed provisions will need to be reviewed and modified as may be appropriate.

Section 17

Whidbey proposes that this section be modified so as to be limited to the subject matter of the Agreement, namely calling within the South Whidbey Rate Center.

Section 18.1

Whidbey proposes that in addition to observance of the LERG, each Party give the other Party at least 30-Days advance written notice of the activation of any NXX code assigned to it within the South Whidbey Rate Center or of any change in the LERG that would affect the routing of Traffic that is subject to the Agreement. Whidbey further proposes that the contractual obligation to observe the LERG be limited NXX codes within the South Whidbey Rate Center.

Sections 18.2, 18.3 and 19

These sections are likely to be affected by the Commission's determination of whether Sprint is entitled to submit to Whidbey a bona fide request for LNP. They may need to be revised, either as proposed at this juncture by Whidbey, or in other ways, depending upon the Commission's ruling.

Section 20

This section may require further analysis and revision, if appropriate, to assure compliance with FCC and Commission requirements.

Section 21

Whidbey proposes that the rights and obligations set forth in this section be reciprocal. Sprint has proposed that they be unilaterally in Sprint's favor. It is Whidbey's understanding that the obligations under the Act with respect to directory listings apply to all local exchange carriers, not just to incumbent local exchange carriers.

In Section 21.6, Whidbey also proposes that indemnification, holding harmless, and, if requested, defense, apply with respect to directory listings that one Party causes the other Party to include in such other Party's directory.

Section 22

Whidbey proposes that this section be revised to correspond more closely to the structure by which 911-related matters are currently structured within the South Whidbey Exchange, and to make clear that neither Party has responsibility for the other Party's 911 Records, except under certain, specified circumstances.

Section 22.3

As proposed by Sprint, this section would appear to allow 911 calls from one Party to be routed to the other Party over Interconnection Facilities. It is not clear what expectation this would imply as to what the Party receiving such call is to do with the call. It appears that the expectation may be that the Party receiving such call would then forward the call

to the appropriate PSAP. In Whidbey's view, such routing should not be required by the Agreement. Any arrangements affecting so critical a subject, if such routing is to be used, would need to be worked out in advance, including ensuring that issues pertaining to liability were adequately addressed.