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 BRIEF IN SUPPORT OF WHIDBEY'S ANSWER TO PETITION FOR ARBITRATION

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1 Pursuant to the Commission's requirements set forth in WAC 480-07-630(7)(f)(2), Whidbey Telephone Company ("Whidbey") hereby submits its legal brief addressing the disputed issues in this matter.

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I. WHIDBEY SHOULD NOT BE REQUIRED TO NEGOTIATE AND ENTER INTO AN INTERCONNECTION AGREEMENT, THE PRINCIPAL, IF NOT SOLE, PURPOSE OF WHICH IS TO ENABLE SPRINT'S CUSTOMER TO PROVIDE UNLAWFUL SERVICE AND TO RENDER WHIDBEY AN ACCOMPLICE TO SUCH UNLAWFUL ACTIVITY.

3 Sprint Communications Company L.P. ("Sprint") has repeatedly acknowledged that the purpose for the local interconnection being sought by Sprint is to provide local service to Millennium Cable Company. Sprint has characterized its relationship with Millennium Cable Company in different ways. For example, on May 21, 2007, Sprint advised Whidbey's representative that Sprint was providing wholesale local exchange service to "Millennium Digital Media." Sprint's letter, dated June 13, 2007, states that Sprint "is the network provider for Millenium Cable Company who will begin selling local service in your service area."[1] Subsequently, Sprint's letter of June 14, 2007, stated that Sprint is a CLEC "partnering" with Millennium Cable to provide service in Washington.[2] Still later, Sprint's letter of July 27, 2007, argued that the Federal Communications Commission ("FCC") had "validated Sprint's wholesale business model," again suggesting that Sprint would be providing wholesale service to another entity that, in turn would be providing retail local exchange service.[3]

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[1] Answer, Attachment 4, Exhibit 7.
[2] Answer, Attachment 4, Exhibit 8.
[3] Petition, Exhibit G.

4 Based upon these statements by Sprint, Whidbey raised as a threshold issue its concern regarding the fact that Millennium Cable Company did not appear to be a registered telecommunications company within the State of Washington. Registration appears to be a threshold requirement. RCW 80.36.350 provides, in part,

> Each telecommunications company not operating under tariff in Washington on January 1, 1985, shall register with the commission before beginning operations in this state.

5 Whidbey set forth its concern in its letter, dated July 6, 2007, to Ms. Danilov of Sprint, as follows:

> It appears from your correspondence that the only use Sprint plans to make of the requested LNP is to enable a third party – which your June 13 letter identifies as Millenium Cable Company – to provide local exchange service in the South Whidbey exchange without being lawfully registered with the Washington Utilities and Transportation Commission ("WUTC") as a telecommunications carrier.[4]

6 This same issue was addressed for extensively is a letter, dated June 22, 2007, from Mr. Snyder on behalf of Whidbey to Joseph C. Cowin, Senior counsel for Sprint. That letter stated, in part,

> It is Whidbey's understanding that Sprint does not, and does not presently intend to, provide local exchange telecommunications services directly to end user customers within the South Whidbey exchange, but rather intends to provide solely wholesale local exchange services to the entity that your [June 14, 2007] letter identifies as 'Millenium Cable,' and that it would be that entity that would provide retail local exchange telecommunications services to its end user customers utilizing the underlying wholesale local exchange services furnished by Sprint.
>
> * * * *
>
> . . . to the best of Whidbey's knowledge, Millenium Cable is not authorized by the Washington Utilities and Transportation Commission to provide local exchange telecommunications services in the State of

[4] Answer, Attachment 4, Exhibit 8.

> Washington, or, more particularly, in the area encompassed by Whidbey's South Whidbey exchange. Thus, if the purpose of the requested interconnection being request [sic] of Whidbey by Sprint is to facilitate an exchange of traffic with respect to which Millenium Cable is (or would be) providing local exchange telecommunications services, without Millenium Cable being properly authorized by the Washington Utilities and Transportation Commission to provide such services in the relevant geographic area, Whidbey would likely be unwilling to provide such interconnection on the basis that such interconnection has an unlawful purpose. That issue – whether the interconnection requested by Sprint is for the purpose, either in whole or in part, of facilitating the provision by Sprint's customer of local exchange telecommunications services in violation of the laws of the State of Washington – is a significant initial issue that needs to be resolved before interconnection discussions can proceed.[5]

Finally, in a letter, dated August 10, 2007, on behalf of Whidbey to Sprint, Mr. Snyder stated,

> . . . with exceptions not here relevant, under the laws of the State of Washington, an entity providing telecommunications services to the public for hire must be registered with the Washington Utilities and Transportation Commission ("WUTC"). RCW 80.36.350. Whidbey has endeavored to ascertain whether Sprint's wholesale customer is so registered, and it does not appear to be. A violation of the requirement for registration with the WUTC is a violation of Washington's public service laws. Aiding or abetting such a violation carriers civil and criminal penalties. *See, generally,* RCW 80.04.380, -.385, -.387 and .390. Whidbey is concerned that if, knowing the identity of Sprint's wholesale customer and it appearing that such customer is not registered with the WUTC, Whidbey were to provide the 'interconnection' that Sprint appears to be seeking, so doing could potentially be viewed as aiding or abetting the unlawful provision of service by Sprint's wholesale customer, and Whidbey or its personnel might thereby become exposed to potential liability for civil or criminal penalties. Under these circumstances, Whidbey does not feel that it can move forward with steps looking toward effecting such interconnection – or the exchange of local traffic contemplated by such interconnection – unless and until there is adequate assurance that the service Sprint intends to facilitate by the requested interconnection and contemplated traffic exchange is not unlawful.[6]

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[5] (Petition, Exhibit F, p. 2.)
[6] (Petition, Exhibit I, p. 3.)

7 Sprint never stated that its purpose was anything other than to enable Millenium Cable Company to provide local exchange service in the South Whidbey Exchange. Nor did Sprint ever state that it was providing, or intended to utilize the interconnection it was seeking from Whidbey to provide, local exchange service to any other wholesale customer or to any retail customers of its own.[7] Nor did Sprint ever indicate either (i) that Millenium Cable Company intended to register with the Commission, or (ii) that Sprint would require that it be registered before it provided services to it for resale, or (iii) that Sprint believed that Millenium Cable Company was exempt from the registration requirements of RCW 80.36.350. Sprint could readily have addressed and allayed Whidbey's concerns in this regard if Sprint had been willing to address the issue on the merits, but, for reasons known only to it, chose not to do so.

8 As set forth in the correspondence quoted above, it appears that the sole purpose for the local interconnection sought by Sprint is to facilitate the provision by Millenium Cable Company of retail local exchange service in the South Whidbey Exchange, and that Millenium Cable Company is not registered with the Commission as a telecommunications carrier. Without any grounds for exemption having been identified, such registration is required by RCW 80.36.350.

9 This set of conditions places Whidbey and its officers, agents and employees at risk of being assessed penalties and potential criminal violations if it aids Millennium

[7] In his letter of July 27, 2007, Mr. Pfaff of Sprint did state, "Initially Sprint intends to provide wholesale services, but we do not intend for the resulting interconnection agreement to preclude Sprint's provision of services on a retail basis." (Petition, Exhibit G, p. 1.) Of course, that is very different than stating that Sprint intends to provide services on a retail basis in the foreseeable future.

Cable Company in the unauthorized provision of telecommunications services. The applicable statutes are set out below:

RCW 80.04.380 provides:

> Every public service company, and all officers, agents and employees of any public service company, shall obey, observe and comply with every order, rule, direction or requirement made by the commission under the authority of this title, so long as the same shall be and remain in force. Any public service company which shall violate or fail to comply with any provision of this title, or which fails, omits or neglects to obey, observe or comply with any order, rule, or any direction, demand or requirement of the commission, shall be subject to a penalty of not to exceed the sum of one thousand dollars for each and every offense. Every violation of any such order, direction or requirement of this title shall be a separate and distinct offense, and in case of a continuing violation every day's continuance thereof shall be and be deemed to be a separate and distinct offense. (Emphasis added.)

RCW 80.04.385 provides as follows:

> Every officer, agent or employee of any public service company, who shall violate or fail to comply with, or procures, aids or abets any violation by any public service company of any provision of his title, or who shall fail to obey, observe or comply with any order of the commission, or any provision of any order of the commission, or who procures, aids or abets any such public service company in its failure to obey, observe and comply with any such order or provision, shall be guilty of a gross misdemeanor. (Emphasis added.)

RCW 80.04.387 provides as follows:

> Every corporation, other than a public service company, which shall violate any provision of this title, or which shall fail to obey, observe or comply with any order of the commission under authority of this title, so long as the same shall be and remain in force, shall be subject to a penalty not to exceed the sum of one thousand dollars for each and every offense. Every such violation shall be a separate and distinct offense, and the penalty shall be recovered in an action as provided in RCW 80.04.400. (Emphasis added.)

RCW 80.04.390 provides as follows:

> Every person who, either individually, or acting as an officer or agent of a corporation other than a public service company, shall violate any provision of this title, or fail to observe, obey or comply with any order made by the commission under this title, so long as the same shall be or remain in force, or who shall procure, aid or abet any such corporation in its violation of this title, or in its failure to obey, observe or comply with any such order, shall be guilty of a gross misdemeanor. (Emphasis added.)

10 The foregoing provisions of Title 80 RCW, taken together, proscribe violations of Title 80 RCW and impose potential liability for violations upon each public service company, and every officer, agent or employee of any public service company_who aids or abets any violation by any public service company of any provision of Title 80 RCW. The definition of a "public service company" set forth in RCW 80.04.110 includes "every . . . telecommunications company." "Telecommunications company" is defined in RCW 80.04.010 as including "every corporation, company, . . . partnership and person owning, operating or managing any facilities used to provide telecommunications for hire, sale, or resale to the general public within this state." Finally, RCW 80.04.010 defines "telecommunications" as "the transmission of information by wire, cable, radio, optical cable, electromagnetic, or similar means." Under these definitions, it is clear that Whidbey and Millenium Cable Company are public service companies, as is Sprint if it is determined to be a "telecommunications carrier" eligible to request interconnection pursuant to Section 251(a) and (b) of the Act. Sprint's plan to enable Milleninum Cable Company to provide local exchange service without Millenium Cable Company being registered with the Commission as a telecommunications company would appear to be aiding and abetting a violation of Title 80 RCW, and for Whidbey to provide local

interconnection to Sprint in furtherance of Sprint's business plans in this regard exposes Whidbey and its officers, employees and agents to potential civil and criminal liability.

11 The importance of this threshold issue is underscored by the Commission's own statutory obligations. RCW 80.04.460 charges the Commission with responsibility for enforcement of the public service laws:

> It shall be the duty of the commission to enforce the provisions of this title and all other acts of this state affecting public service companies, the enforcement of which is not specifically vested in some other officer or tribunal.

Thus, for the Commission to order Whidbey to negotiate or enter into any agreement that would require Whidbey to aid and abet the unlawful provision of local exchange service by Millenium Cable Company would be contrary to the Commission's duty, under RCW 80.04.460, to enforce the provisions of Title 80, including registration requirements of RCW 80.36.350 and the provisions quoted above that prohibit the aiding or abetting of any violation of Title 80 RCW.

12 For the foregoing reasons, the Commission should hold that Whidbey did not have, and does not have, any obligation under Sections 251 or 252 of the Act to enter into negotiations with Sprint for the purpose of providing Sprint with interconnection (including LNP), the purpose of which is to enable Sprint to provide wholesale local exchange services to, or otherwise to assist, Millenium Cable Company to provide retial local exchange service in Whidbey's service area unless and until Millenium Cable Company shall first have registered with the Commission as a telecommunications company, as required by RCW 80.36.350.

13 This request is not inconsistent with 47 C.F.R. § 51.301(c)(4), which designates "[c]onditioning negotiation on a requesting telecommunications carrier first obtaining state certifications" as violating the duty to negotiate in good faith. That provision was adopted out of concern for the delay that requiring certification as a prerequisite for interconnection negotiations would introduce. Washington's registration regimen does not share the time-consuming characteristics that certification regimens often entail. The Commission facilitates registration (see the Commission's webpage http://www.wutc.wa.gov/webdocs.nsf/0492664a7ba7ed8b88256406006bf2ca/e2506cb79c8b992c88256801007df38b!OpenDocument), and with the discontinuance by the Legislature of the filing of price lists with the Commission, the process has become even simpler. *See, e.g.*, WUTC Docket Nos. UT-070265 (30 days between filing of petition and grant of registration); UT-070201 (30 days between filing of petition for registration and grant of petition); UT-070136 (30 days between filing of petition for registration and grant of registration); UT- 070093 (30 days between filing of petition for registration and grant of registration). Moreover, over five months have elapsed his Sprint initiated its request to Whidbey for interconnection negotiations, and still no petition for registration has been filed with the Commission by Millenium Cable Company.

14 Also, Whidbey did not express any requirement that Sprint (the entity requesting interconnection) obtain State certifications, but questioned the lawfulness of the arrangement Sprint sought based upon the lack of registration of Sprint's only identified customer. If Sprint had represented that prior to operation Millennium Cable Company would obtain Commission registration, that would have been enough to resolve this issue

and voluntary negotiations could have proceeded (assuming resolution of the other threshold issues). However, Sprint made no such representation.

15 Finally, as a matter of strict interpretation of the Act, Whidbey is not under an obligation to negotiate in good faith, although it is willing to do so, since the obligation on an incumbent local exchange carrier to negotiate arises only under Section 251(c) of the Act, and at the time Whidbey raised it concerns regarding the absence of registration, it was exempt from Section 251(c) of the Act by reason of Section 251(f)(1) of the Act. See, e.g., Sprint Communications Co. L.P. v. Pub. Util. Comm'n of Tex., No. A-016-CA-065-SS, slip op. 2006 WL 4872346 (W.D.Tex. Aug. 14, 2006).

II. SPRINT HAS FAILED TO ESTABLISH THAT IT IS ENTITLED TO INTERCONNECTION PURSUANT TO SECTION 251(a) AND (b) OF THE ACT

16 Section 251(a) of the Act provides in relevant part as follows:

> Each telecommunications carrier has the duty –
> (1) to interconnect directly or indirectly with the facilities and equipment of other telecommunications carriers. (Emphasis added.)

It is only other telecommunications carriers that are entitled to interconnection. The term "telecommunications carrier" is defined in Section 153(44) of the Act as follows:

> The term 'telecommunications carrier' means any provider of telecommunications services, except that such term does not include aggregators of telecommunications services (as defined in section 226 of this title). A telecommunications carrier shall be treated as a common carrier under this chapter only to the extent that it is engaged in providing telecommunications services, except that the Commission shall determine whether the provision of fixed and mobile satellite service shall be treated as common carriage.

"Telecommunications services" is further defined in Section 153(45) of the Act as follows:

> The term "telecommunications service" means the offering of telecommunications for a fee directly to the public, or to such classes of users as to be effectively available directly to the public, regardless of the facilities used. (Emphasis added)

Thus, in order for a person or entity to be a telecommunications carrier for purposes of Sections 251 and 252, the services it offers must be offered "for a fee directly to the public, or to such classes of users as to be effectively available directly to the public." The issue of whether Sprint offers its services "to such classes of users as to be effectively available directly to the public" turns upon whether Sprint offers its telecommunications services here at issue as a "common carrier." *Virgin Islands Telephone Corp. v. FCC*, 198 F.3d 921,922, 926 (D.C. Cir. 1999) (holding that the FCC's interpretation, that the term "telecommunications carrier" "means essentially the same as common carrier," was reasonable); *see also Iowa v. F.C. C.*, 218 F.3d 756, 758 (D.C. Cir. 2000) ("[A] carrier that provides a service on a non-common carrier basis is not a 'telecommunications carrier.'").

17 The relevance of this definition to the issue of whether Sprint is eligible to claim the benefits of Section 251(a) of the Act was underscored by the FCC in the Memorandum Opinion and Order, released March 1, 2007, in *Time Warner Cable Request for Declaratory Ruling that Competitive Local Exchange Carriers May Obtain Interconnection Under Section 251 of the Communications Act of 1934, as Amended, to Provide Wholesale Telecommunications Services to VoIP Providers*, WC Docket No. 06-55 (DA 07-709) ("Time Warner Order"), a copy of which is attached to the Petition as Exhibit H and upon which Sprint relies. As stated in that decision,

The definition of 'telecommunications services' in the Act does not specify whether those services are 'retail' or wholesale,' but merely specifies that 'telecommunications' be offered for a fee 'directly to the public, or to such classes of users as to be effectively available directly to the public.' In *NARUC II*, the D.C. Circuit stated that '[t]his does not mean that the particular services offered must practically be available to the entire public; a specialized carrier whose service is of possible use to only a fraction of the population may nonetheless be a common carrier if he holds himself out to service <u>indifferently</u> all potential users.' [footnotes omitted.]"[8] (emphasis added).

The importance of this limitation upon the FCC's decision was reiterated later in that order:

To address concerns by commenters about which parties are eligible to assert these rights, we make clear that the scope of our declaratory ruling is limited to wholesale carriers that are <u>acting as telecommunications carrier [sic] for purposes of their interconnection request</u>[9] (emphasis added).

18 Sprint never offered any evidence that it is offering the local exchange services it proposes to furnish to Millenium Cable Company as a common carrier: Not in response to Whidbey's correspondence; nor in any other way in the course of this proceeding.

19 Whidbey asked Sprint to provide it with identification of any Sprint tariff or price list that offers such services in the State of Washington, but none has been provided. No Sprint tariff for these services has been found on file with the Washington Utilities and Transportation Commission in the name of Sprint Communications Company L.P., nor has any price list for them been found on Sprint's website. *See* <u>http://www2.sprint.com/tariffs/</u>. This contrasts with the situation in other states, where Sprint has filed a tariff offering the same or similar services. <u>See, e.g.</u>, Sprint's Texas

[8] Time Warner Order at ¶12.
[9] Time Warner Order at ¶16.

tariff, excerpts of which are attached as Appendix 1. Moreover, Sprint has described its relationship with Millenium Cable Company as one of "partnering" with it,[10] which would seem to be contrary to the requirements of common carriage, most specifically that the service be offered "indifferently."

20 The Commission should require that Sprint establish that the service it proposes to furnish to Millenium Cable Company is telecommunications service within the meaning of that term as defined in the Act, and in the absence of Sprint carrying its burden of proof on that issue, Whidbey should not be required to enter into any interconnection negotiations with Sprint or any interconnection agreement with Sprint.

21 It is important to note that Sprint did not allege in its Petition that it is a telecommunications carrier with respect to the services that it proposes to offer in the South Whidbey exchange. Even if Sprint had so alleged in the Petition, the absence of any verification on that Petition or, in the alternative, being submitted under affidavit or declaration (as required by WAC 480-07-630(8)), means that Sprint has wholly failed to carry its burden with respect to this issue, which was fully identified by Whidbey in its correspondence with Sprint.

22 Sprint may try to argue that the Commission should not focus on its relationship with Millenium Cable Company, but rather on the prospect that through its provision of service to Millenium Cable Company, its services will become available to the general public – or at least so much of the general public as may be served by Millenium Cable

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[10] In its letter, dated June 14, 2007, Sprint stated, "Sprint Communications Company L.P. ('Sprint') is a competitive local exchange carrier ("CLEC") partnering with Millennium Cable to provide service in Washington." (Petition, Exhibit E, p. 1.)

Company within Whidbey's exchange service area. However, to meet this portion of the definition of "telecommunications service" in Section 153(43) of the Act, that is "to such classes of users as to be effectively available directly to the public," Sprint must demonstrate that it acts as a common carrier as to the class of users into which Millenium Cable Company falls. Sprint has not produced any evidence of an "indiscriminant" offering for such customers.[11] The Commission should focus upon the services offered by Sprint to Millenium Cable Company and upon whether Sprint offers those services on a common carrier basis. Again, Whidbey invites the Commission to contrast the existence of a tariff for such services in Texas and the absence of a price list in Washington.

III. WHIDBEY SHOULD NOT BE REQUIRED TO PROVIDE LNP IN THE SOUTH WHIDBEY RATE CENTER TO SPRINT DUE TO SPRINT'S LACK OF ELIGIBILITY TO SUBMIT A REQUEST FOR LNP, ITS REPEATED FAILURE TO COMPLY WITH THE FCC'S LNP RULES, AND ITS REPEATED FAILURE TO PROVIDE WHIDBEY WITH THE LNP-RELATED INFORMATION IT REQUESTED.

23 Section 251(b)(2) of the Act provides that each local exchange carriers has the duty to provide, to the extent technically feasible, number portability in accordance with requirements prescribed by the FCC. In furtherance of that provision, the FCC has adopted rules relating to the deployment of local number portability ("LNP"), including Section 52.23 of its rules, 47 C.F.R. § 52.23. That section includes the followings provision:

[11] Although not produced by Sprint, even when directly asked for such support, Whidbey has recently found the case of *Consolidated Communications of Fort Bend Co. v. Pub. Utility Comm. of Texas*, 497 F.Supp.2d 836 (W.D. Texas, 2007). In that case, the Texas District Court found that the service offered to cable companies by Sprint did qualify as common carriage. However, that case is easily distinguished in that in the Texas case Sprint produced facts as to its business model and had an applicable tariff on file. 497 F.Supp.2d 845-846. This in stark contrast to Sprint's factual presentation in this proceeding.

> "(2) Any procedures to identify and request switches for the deployment of number portability must comply with the following criteria:
>
> "(i) Any wireline carrier that is certified (or has applied for certification) to provide local exchange service in a state, or any licensed CMRS provider, must be permitted to make a request for deployment of number portability in that state.
>
> * * * * *
>
> "(iii) A LEC must make available upon request to any interested parties a list of its switches for which number portability has been requested and a list of its switches for which number portability has not been requested."

It is not clear from the FCC's rule whether this provision is necessarily applicable. However, in submitting its purported bona fide request for LNP, Sprint treated it as though it were applicable and requested that Whidbey provide it with the information contemplated by the rule (as well as additional information not contemplated by the rule).[12] In response, Whidbey provided the requested information, and requested from Sprint information that Whidbey felt would be needed in order to deploy LNP successfully.[13] Whidbey subsequently asked for additional LNP-related information, including that described in Section 52.23(b)(2)(iii) of the FCC's rules, and repeated or renewed these requests.[14] Notwithstanding these repeated requests, Sprint has never supplied the requested LNP information.

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[12] Answer, Attachment 4, Exhibit 1.
[13] Answer, Attachment 4, Exhibit 2.
[14] Answer, Attachment 4, Exhibits 2, 6 and 8.

24 As noted above, Sprint has treated LNP has an element of the local interconnection it is seeking, and it included provisions addressing LNP in the discussion draft Interconnection Agreement that accompanied its letter of May 10, 2007.[15]

25 The principal provision relating to a local exchange carrier's obligation to make LNP available is contained in Section 52.23(c) of the FCC's rules:

> "Beginning January 1, 1999, all LECs must make a long-term database method for number portability available within six months after a specific request by another telecommunications carrier in areas in which that telecommunications carrier is operating or plans to operate." (Emphasis added.)

Under this provision, a potential requester of LNP must satisfy at least two requirements: it must be a telecommunications carrier and the request must pertain to areas in which its is operating a telecommunications carrier or in which it intends to operate as a telecommunications carrier. In addition, Subsection (b)(2)(i), set out above, imposes a third requirement, namely that the requesting carrier be certified, or have applied for certification, to provide local exchange service in the state.

26 The discussion under Section II, above, is germane to the question of whether Sprint is acting as a telecommunications carrier, or intends to operate as a telecommunications carrier, in the area for which it was seeking LNP from Whidbey, namely the South Whidbey Rate Center. Notwithstanding the issue having been timely raised by Whidbey, Sprint has adduced no evidence that it is acting as a "telecommunications carrier," or that it intends to act as a "telecommunications carrier"

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[15] Petition, Exhibit B.

in the South Whidbey Rate Center, within the meaning of the term "telecommunications carrier" as defined in the Act.[16]

27 Until recently, November 8, 2007, to be exact, it was not clear that a CLEC could request LNP on behalf of an interconnected voice over Internet protocol (VoIP) provider. However, the FCC has recently clarified the law concerning that relationship and has ruled that under certain circumstances, a CLEC may request LNP on behalf of an interconnected VoIP provider.[17] However, this ability is not without limitation.

28 The FCC clearly limited the ability of a wireline carrier (CLEC) to request LNP on behalf of an interconnected VoIP provider. The FCC stated that "subject to a valid port request on behalf of a user a wireline carrier must port out [a number] to ... an interconnected VoIP provider that partners with a wireline carrier for numbering resources, where the partnering wireline carrier has facilities or numbering resources in the same rate center as the porting-out wireline carrier."[18] Thus, in order for LNP to apply, the VoIP related wireline carrier must have facilities or numbering resources in the same rate center as the porting-out wireline carrier. Thus, Sprint must demonstrate that it has facilities or numbering resources within the South Whidbey Rate Center.

29 Further, the FCC clearly made the obligation for porting a reciprocal obligation. The interconnected VoIP provider has to be able to port out a number to the wireline

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[16] For purposes of Part 52 of the FCC's rules, Section 52.5(g) of the FCC's rules defines a "telecommunications carrier" as "any provider of telecommunications services, except that such term does not include aggregators of telecommunications services (as defined in 47 U.S.C. 226(a)(2), and defines a "telecommunications service" as referring "to the offering of telecommunications for a fee directly to the public, or to such classes of users as to be effectively available directly to the public, regardless of the facilities used." 47 C.F.R. § 52.5(g) and (h) (emphasis added).

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

[18] FCC LNP Order at ¶35.

carrier that is the incumbent within that rate center.[19] Sprint never responded to Whidbey's requests to establish reciprocal LNP information.

30 Applying the foregoing tests, Sprint does not appear to have been entitled to request LNP from Whidbey in the South Whidbey Rate Center, where the only present or reasonably foreseeable purpose for such LNP was to provide wholesale service to Millenium Cable Company. First, Sprint did not qualify as a common carrier for purposes of such request. Second, it was not providing service and, other than for seemingly unlawful service to Millenium Cable Company, did not intend to provide service in the South Whidbey Rate Center. Third, it does not appear that Sprint is a "wireline carrier within the telephone number's originating rate center."[20] Fourth, Sprint and its VoIP related entity, Millenium Cable Company, do not appear to be able to port numbers reciprocally as required by the FCC – at least to date Sprint has refused to provide the required information.

31 Sprint's purported request for LNP should also be rejected, and LNP provisions should not be required to be included in any interconnection agreement between Sprint and Whidbey that may be required as a result of this proceeding, because of Sprint's persistent failure to provide the LNP-related information that Whidbey has requested. First, as discussed above, much of that information was the information described in Section 52.23(b)(2)(iii) of the FCC's rules, which, to the extent applicable – and Sprint treated it as being applicable in its requests to Whidbey – requires such information to be provided by all LECs.

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[19] FCC LNP Order at ¶34.
[20] FCC LNP Order at ¶35.

32 Moreover, Section 51.301(c)(8) of the FCC's rules, 47 C.F.R. § 51.301(c)(8)) designates "[r]efusing to provide information necessary to reach agreement" as a failure to negotiate in good faith. Finally, as Whidbey explained in its letter, date June 5, 2007,[21] "Whidbey is making this request [for LNP in Sprint switches] in order to be assured that, if and when [Sprint] commences providing local exchange services in the South Whidbey rate center, then by such date, if any, as Whidbey may be required to provide LNP to [Sprint], Sprint will have LNP available to Whidbey so that end-user customers who may have caused their local numbers to be ported from Whidbey to [Sprint], or who otherwise are served by [Sprint] as a local exchange carrier in the South Whidbey rate center (including those who are served by a carrier to which [Sprint] may then be providing wholesale local exchange services), will be able to have their local numbers ported to Whidbey." From Sprint's failure to acknowledge Whidbey's conditional request for LNP and to supply the information regarding LNP deployment that Whidbey requested, it appears that Sprint wants LNP in the South Whidbey rate center to be a "one-way street." If so, this is directly contrary to the FCC's Time Warner Order, in which the FCC stated, "In addition, we agree that it is most consistent with Commission policy that where a LEC wins back a customer from a VoIP provider, the number should be ported to the LEC that wins the customer at the customer's request, [footnote omitted] and therefore we make such a requirement an explicit condition to the section 251 rights [of wholesale telecommunications carriers] provided herein."[22]

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[21] Answer, Attachment 4, Exhibit 6.

[22] Time Warner Order at ¶16. See, also, FCC LNP Order at ¶34-35.

IV. WHIDBEY SHOULD NOT BE REQUIRED TO ENTER INTO AN INTERCONNECTION AGREEMENT THAT REQUIRES IT TO COMPLY WITH UNSPECIFIED AND CHANGING INDUSTRY STANDARDS OR GUIDELINES.

33 Attached to the Petition was a copy of the discussion draft Interconnection Agreement that accompanied Sprint's letter to Whidbey of May 10, 2007. Sprint has not provided the Commission with any support for any of the provisions that it has included in that discussion draft Interconnection Agreement.

34 Attachment 1 to Whidbey's Answer is a revised version of the discussion draft Interconnection Agreement, reflecting Whidbey's proposed revisions to that agreement. Also attached to Whidbey's Answer is a redlined version of the draft Interconnection Agreement, showing the modifications that Whidbey is proposing. Attachment 2 to Answer.

35 One of the recurring aspects of the Interconnection Agreement, as proposed by Sprint, is its attempt to bind Whidbey to deploy and observe "industry standards," "industry practices" and "industry guidelines." Not only are those standards, practices and guidelines not designated with sufficient specificity to allow them to be identified, but it is also unclear whether the Interconnection Agreement intends to require compliance with those standards, guidelines and practices only as they might exist at such time as the Interconnection Agreement might be entered into, or whether the Interconnection Agreement is intended to require compliance with those standards, guidelines and practices as the same might be changed thereafter from time to time.

36 If any Interconnection Agreement resulting from this proceeding is to refer to standards, practices or guidelines, they should either be identified with sufficient

specificity as to allow the parties to know what is being agreed to and to minimize future potential litigation over the meaning of such terms, or they should be limited to those standards, practices and guidelines as shall be mutually agreeable to the parties. If this arbitration proceeding were to order entry into the Interconnection Agreement submitted by Sprint, and if the references in that agreement in industry standards, guidelines and practices were understood to refer to such standards, guidelines and practices, as the same might change over time, the Whidbey respectfully submits that for the Commission to order such a result would constitute an unlawful delegation of legislative authority to "the industry," in violation of the Fifth and Fourteenth Amendments to the Constitution of the United States and in violation of the due process and equal protection provisions of the Constitution of the State of Washington.

CONCLUSION

37 Whidbey's primary position is that this matter should be dismissed for want of jurisdiction. Absent such dismissal, Whidbey's position is that this matter should be bifurcated.

38 The first element of this proceeding under a bifurcated approach would be to resolve the threshold issues that Whidbey has identified. Sprint has failed to provide sufficient demonstration that it is a telecommunications carrier for purposes of seeking an interconnection agreement under Section 251(a) and Section 251(b). The Commission should address the question of whether Millenium Cable Company must be registered, assuming that Sprint can demonstrate that it is otherwise a telecommunications carrier, so that Whidbey is not in the position of aiding or abetting the unauthorized provision of intrastate telecommunications services. Further, the Commission should determine

whether or not LNP is available to an interconnected VoIP provider where the CLEC with which the VoIP provider is interconnected and the VoIP provider failed to provide evidence that they have facilities or numbers in the area designated for porting and failed to demonstrate that they could reciprocally engage in the porting of numbers, which the FCC identified as a requirement for consumers to receive the benefit of number portability. Overlaying all of this is the question of whether the Commission has jurisdiction to address Section 251(a) and (b) issues through an arbitration proceeding for a rural telephone company that holds an exemption under 47 U.S.C. §251(f)(1).

39 If all of the threshold issues are resolved, then Whidbey's position is that the parties should be given a specific period of time within which to engage in direct negotiations of the terms of an interconnection agreement. Sprint has, through its failure to address issues raised by Whidbey and its delay in responding to Whidbey on even basic issues, delayed the process so that negotiations did not actually take place. Sprint should not be able to capitalize on its own inaction and its own failures to force arbitration of issues where there have been no meaningful negotiations on the part of Sprint.

Dated this 16th day of November, 2007.

WHIDBEY TELEPHONE COMPANY

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