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 SPRINT COMMUNICATIONS COMPANY, L.P.'S BRIEF ON THRESHOLD ISSUES

FACTS

1 The Declaration of James R. Burt, submitted herewith on behalf of Petitioner Sprint Communications Company, L.P. ("Sprint") establishes the factual basis for the business model that will be used to provide Voice Over Internet Protocol ("VoIP") service with Millennium Digital Media Systems, L.L.C. ("Millennium") in the serving area of Whidbey Telephone Company ("Whidbey"). Mr. Burt attests that the Sprint cable/business model for Washington is the same one considered in proceedings before the Federal Communications Commission ("FCC") and four federal district courts, all of which upheld Sprint's cable/business model and interconnection rights. They rejected Whidbey's position on its illusory "threshold issues." So should this Commission.

ARGUMENT

A. Sprint is a "Telecommunications Carrier" Eligible for Interconnection Under 47 U.S.C. § 251(a).

2 Whidbey claims (a) it need not negotiate an interconnection agreement with Sprint, and (b) that it need not honor Sprint's local number portability ("LNP") request because

Sprint is not a "telecommunications carrier" under the Act.[1] The FCC rejected this claim in the *Time Warner Order*[2] when it expressly found that a provider of wholesale services (i.e. Sprint) can be a common carrier when offering services to other carriers (i.e. Millennium) and is a "telecommunications carrier" under the Act. Furthermore, the FCC also relied upon § 706 of the Act in "affirming the rights of wholesale carriers to interconnect for the purpose of exchanging traffic with VoIP providers ... [to] spur the development of broadband infrastructure".[3]

3 The FCC in the *Time Warner Order* states plainly, "[W]e reaffirm that wholesale providers of telecommunications services are telecommunications carriers for the purpose of Sections 251(a) and (b) of the Act, and are entitled to the rights of telecommunications carriers under that provision."[4] In reaching its conclusion, the FCC examined the Sprint/cable wholesale model because Time Warner Cable obtains wholesale services from Sprint.[5]

4 Most important, the FCC rejected a Nebraska Public Service Commission determination that Sprint was not acting as a common carrier with its cable wholesale customer, Time Warner, because its relationship was an "individually negotiated and tailored, private business arrangement, that is an untariffed offering to a sole user of this service."[6]

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[1] The Telecommunications Act of 1996, Pub.L. 104-104, 110 Stat.56 (1996) codified as 47 U.S.C. § 251, et seq. (the "Act").

[2] *In the Matter of Time Warner Request for Declaratory Relief*, 22 FCC Rcd. 3513 (2007).

[3] Id. at Paragraph 13.

[4] Id. at Paragraph 1.

[5] Id. at Paragraph 2.

[6] Id. at Paragraphs 6, 14. See also, Paragraph 1 ("We conclude that state commissions denying wholesale providers the right to interconnect with incumbent LECs pursuant to sections 251(a) and (b) of the Act are inconsistent with the Act and Commission precedent and would frustrate the development of competition and broadband deployment.")

That is how Whidbey characterizes Sprint's relationship with Millennium in its argument that Sprint is not a "telecommunications carrier."

5 The FCC rejected that argument when it upheld Sprint's § 251(a) rights and established precedent in the *Time Warner Order* that must be followed by this Commission. As the agency charged with administering the Act, the FCC is the controlling authority on these issues. *AT&T Corp. v. Iowa Utilities Board*, 525 U.S. 366, 378 (1999); *Indiana Bell Telephone Co., Inc. v. Indiana Utility Regulatory Comm'n,* 359 F.3d 493, 494 (7th Cir. 2004); *MCI Communications Corp. v. American Tel. and Tel.,* 708 F.2d 1081, 1101 (1983). Four federal district court cases (three of the cases – New York, Illinois, Texas – affirmed the decisions of the underlying state commissions that entitled Sprint to interconnect as a wholesale provider)[7] also confirm the FCC's views, as well as decisions from public utility commissions in Iowa, Indiana, Ohio, Oklahoma and Pennsylvania[8] regarding Sprint's entry into the competitive market. In *Harrisonville Telephone Company v. Illinois Commerce Commission*, the court agreed that Sprint's cable business model offered services to "such class of users as to be effectively available directly to the public" noting at p.7 of its decision:

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[7] *Consolidated Comm. Fort Bend v. Public Util.Comm'n*, 497 F.Supp.2d 836 (W.D. Tex. 2007); *Sprint Communications Co., L.P. v. Nebraska Public Service Comm'n,*, 2007 WL 2682181, (D.Neb.) September 7, 2007 (No. 4:05CV3260); *Berkshire Telephone Corp. v. Sprint Communications Co., L.P.,* 2006 WL 3095665, (W.D.N.Y.) October 30, 2006 (No. 05-CV-6502 CJS); and *Harrisonville Telephone Company v. Illinois Commerce Commission* No. 06-73-6PM (S.A.Ill.) (September 5, 2007) (Attachment "A").

[8] *Arbitration of: Sprint Comm.Co. L.P. v. Ace Comm. Group et al.,* Order On Rehearing, Iowa Dep't of Commerce Utilities Board, Nos. AREB-05-2, ARB-0505, and ARB-05-6 (Nov. 28, 2005); *In the Matter of Sprint Communications Company L.P.'s Petition for Arbitration,* Order No. 43052-INT-01, 2000 WL 2663730 (Ind.Util.Reg.Comm'n (Sept. 6, 2006); *Application of Sprint Communications Company L.P. For Approval of the Right to Offer, Render, Furnish or Supply Telecommunications Services Etc.,* Penn.Pub.Util.Comm'n Order No. A-310183F0002AMA et al. (Dec. 1, 2006); *In the Matter of the Petition of Sprint Communications Company, L.P.,* Arbitrator's Award, Ohio Pub.Util.Comm'n, Case No. 06-1257-TP-ARB (Feb. 28, 2007); *Application of Sprint Communications Company, L.P.*, Final Order No. 541048 Okla.Corp.Comm'n, Cause No. PUD 200700054 (June 20, 2007).

> Based on Sprint's business model, without Sprint's services, the end-user customer who subscribes to the Sprint-Mediacom service would be incapable of placing or receiving telephone calls, as Sprint's switch performs all switching and routing functions for local, domestic, and foreign toll, emergency, operator assisted, and directory assistance calls. Thus, Sprint provides telecommunication services, and does so in a manner that offers indiscriminate service which is "effectively available directly to the public." Further, Sprint's involvement in the joint provisioning of local telephone exchange service supports the conclusion that Sprint is a telecommunications carrier. *See Berkshire Tel.Corp. v. Sprint Communications Co., L.P.,* No. 05-CV-6502, 2006 WL 3095665, at *6 (W.D.N.Y. October 30, 2006)(holding that Sprint is a telecommunications carrier within the meaning of the Telecommunications Act because "the services Sprint is providing ... will be available to any end user within the specified service territory, albeit through the business relationship with [a cooperating cable company]" providing the local loop while Sprint provided the end office switch and interconnection trunk).

6 In sum, the overwhelming weight of authority, supported by Mr. Burt's Declaration, establishes that Sprint is a "telecommunications carrier" under the Act.

7 The FCC recently confirmed that Sprint can request LNP on behalf of its interconnected VoIP provider. *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. Nov. 8, 2007). Therefore, Sprint is entitled to interconnect with Whidbey and to receive LNP, as a matter of law.[9]

[9] Whidbey asserts that Sprint is still not entitled to LNP because it has not proven that it intends to provide service in the South Whidbey exchange and that it has not provided Sprint switching information. Just as Whidbey cannot appear to comprehend the Commission rule on verifications it cannot comprehend simple statements in Sprint's LNP letters. (Whidbey's Motion for Order of Dismissal, Exhibit C, Exhibits 1,3; Whidbey Answer, Attachment 4, Exhibit 7). These announced Whidbey's plans to operate, via its cable business model in Whidbey exchanges and they provided Sprint's switching entity codes. There is no legal requirement that Sprint "prove" more.

B. Whidbey's State Law Claims Have No Merit.

1. The FCC has held that the regulatory status of the wholesale customer is irrelevant to Sprint's interconnection rights.

8 Again, the FCC's *Time Warner Order* disposes of Whidbey's "issue" as to Millennium's state regulatory status. At Paragraph 15, the FCC said "The regulatory classification of the service provided to the ultimate end user has no bearing on the wholesale provider's right as a telecommunications carrier to interconnect under section 251." (emphasis supplied). As discussed above, the FCC's decision must be followed here.

9 Whidbey has provided no authority that holds that an ILEC can refuse to interconnect with a registered, eligible CLEC because the CLEC's customer "might" be engaging in unlawful activity. Could an ILEC refuse to interconnect with a CLEC that provides phone service to a gambling casino run by the Mafia? Of course not. This illustrates further the irrelevancy of an inquiry into Sprint's customer, yet Whidbey persists in claiming that it need not interconnect with Sprint because Millennium would be acting illegally, because it is not registered with the Commission. This twisted argument is based upon the erroneous assumption that Millennium's activities are even relevant to Sprint's interconnection rights. Commissions in five other states had no difficulty in finding that Sprint was entitled to connect with a VoIP provider. The issue of state regulation of VoIP was not an issue in those cases, and it certainly is not necessary or appropriate for resolution in this § 251 arbitration proceeding.

2. Whidbey's "aiding and abetting" argument is a red herring.

10 Whidbey is legally required to interconnect with Sprint under § 251(a). It has provided no legal authority whatsoever to support its unfounded assertions under Washington

law that liability would flow from fulfilling its direct legal duty to Sprint because of a potential indirect illegal consequence.

CONCLUSION

11 The FCC resolved all "threshold issues" in Sprint's favor in the *Time Warner Order*. Whidbey simply refuses to accept that controlling law and invents a state law issue based upon an "assumed" fact that does not exist. The Commission should quickly dispose of these "issues" so that Sprint can get the interconnection it is entitled to.

DATED this 7th day of December, 2007.

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CERTIFICATE OF SERVICE

I certify that on December 7, 2007, I served the attached document entitled Sprint Communications Company, L.P.'s Brief on Threshold Issues and the Declaration of James R. Burt upon all parties of record in this proceeding by sending a copy by electronic and Federal Express mail, unless otherwise specified, to the following interested parties:

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DATED this 7th day of December, 2007.

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ATTACHMENT "A"
SPRINT'S BRIEF ON THRESHOLD ISSUES [UT-073031]

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ILLINOIS

HARRISONVILLE TELEPHONE COMPANY, MARSEILLES TELEPHONE COMPANY, and METAMORA TELEPHONE COMPANY,	)	
Plaintiffs,	)	
vs.	)	**CIVIL NO. 06-73-GPM**
ILLINOIS COMMERCE COMMISSION, CHARLES E. BOX, Chairman, ERIN M. O'CONNELL DIAZ, Commissioner, LULA M. FORD, Commissioner, ROBERT F. LIEBERMAN, Commissioner, KEVIN K. WRIGHT, Commissioner, in their official capacities as Commissioners of the ILLINOIS COMMERCE COMMISSION and not as individuals, and SPRINT COMMUNICATIONS, L.P., agent of Sprint Communications Company, L.P.,	)	
Defendants.	)	

MEMORANDUM AND ORDER

MURPHY, Chief District Judge:

This matter is before the Court on the motion for a preliminary injunction brought by Plaintiffs Harrisonville Telephone Company, Marseilles Telephone Company, and Metamora Telephone Company (Doc. 37). For the following reasons, the motion is **DENIED**.

Plaintiffs, who are incumbent local exchange carriers ("ILECs"), *see* 47 U.S.C. § 251(h), seek pursuant to the Telecommunications Act of 1996 ("Telecommunications Act"), 47 U.S.C. §§ 151-615b, to overturn orders by Defendant Illinois Commerce Commission ("ICC") compelling the ILECs to arbitrate an interconnection agreement with Defendant Sprint Communications, L.P.

("Sprint"), a competitive local exchange carrier ("CLEC") for the provision of telecommunications services. *See In re Sprint Communications L.P.*, No. 05-0402, 2005 WL 3710338 (Ill. Commerce Comm'n Nov. 8, 2005); *In re Sprint Communications Co., L.P.*, 050259, 050260, 050261, 050262, 050263, 050264, 050265, 050270, 050275, 050277, 050298 (Cons.), 2005 WL 1863370 (Ill. Commerce Comm'n July 15, 2005). The ILECs have requested a preliminary injunction. The motion for a preliminary injunction has been extensively briefed, and the Court has conducted an evidentiary hearing on the motion and now is prepared to rule.

The standard governing a grant of a preliminary injunction is well settled. To obtain a preliminary injunction, the movant must establish that: (1) it has a reasonable likelihood of success on the merits of its claim; (2) it will suffer irreparable harm if injunctive relief is denied; (3) the irreparable harm it will suffer without injunctive relief outweighs the irreparable harm the nonmoving party will suffer if the injunction is granted; and (4) the injunction will not harm the public interest. *See Ty, Inc. v. Jones Group, Inc.*, 237 F.3d 891, 895 (7th Cir. 2001); *Platinum Home Mortgage Corp. v. Platinum Fin. Group, Inc.*, 149 F.3d 722, 726 (7th Cir. 1998). Applicants for preliminary relief face threshold burdens to demonstrate the first two factors: they must show that they have some likelihood of success on the merits and that they will suffer irreparable harm if the requested relief is denied. *See In re Forty-Eight Insulations, Inc.*, 115 F.3d 1294, 1300 (7th Cir. 1997). A likelihood of success exists if the party seeking the injunctive relief demonstrates that it has a better than "negligible" chance of succeeding on the merits of the underlying claim. *Curtis v. Thompson*, 840 F.2d 1291, 1296 (7th Cir. 1988). If the movant can make these threshold showings, the court then moves on to balance the relative harms considering all four factors using a "sliding scale" approach. *See In re Forty-Eight Insulations, Inc.*, 115 F.3d at 1300-01. Under this

approach, the more likely it is that the plaintiff will succeed on the merits, the less the balance of irreparable harms need favor the plaintiff's position. *See Ty, Inc.*, 237 F.3d at 895. In assessing and weighing the competing considerations, "the district court has to arrive at a decision based on a subjective evaluation of the import of the various factors and a personal intuitive sense about the nature of the case." *Roth v. Lutheran Gen. Hosp.*, 57 F.3d 1446, 1453 (7th Cir. 1995) (quoting *Lawson Prods., Inc. v. Avnet, Inc.*, 782 F.2d 1429, 1436 (7th Cir. 1986)). *See also Abbott Lab. v. Mead Johnson & Co.*, 971 F.2d 6, 12 (7th Cir. 1992) (characterizing a district court's preliminary injunction analysis as "subjective and intuitive").

Turning first to the matter of whether the ILECs have demonstrated a reasonable likelihood of success on the merits, to evaluate this factor correctly some discussion of Sprint's business model is required. Sprint's business model, which it has employed in numerous states, including Illinois, requires it to pair with a participating cable company, in this case Mediacom of Illinois ("Mediacom"), to provide together the required components for local telephone service and thereby compete with ILECs to provide local telephone service. The cable company, or last-mile provider, supplies the connection between the end-user customer's home or business and Sprint's switch, which then connects the end-user's telephone call to another party. The cable company conducts the marketing and sales of the telephone service, administers the customer billing, and provides customer service. Sprint provides the switching service and other network components that carry a customer's telephone calls from Sprint's switch to the networks of other service providers. The switching service provided by Sprint is known as the Public Switched Telephone Network ("PTSN") interconnection. Sprint also uses existing phone numbers or acquires new numbers, provides all number administration functions, and performs the porting function of moving services from one

phone number to another. Sprint also is responsible for all inter-carrier compensation, including exchange access and reciprocal compensation.[1] Additionally, Sprint provisions 911 circuits, performs 911 database administration, and places directory listings in the directories of other carriers.

In contending that the orders of the ICC should be reversed, the arguments raised by the ILECs largely are variations on a theme, namely, that because it is Mediacom, not Sprint, that has the end-user relationship with customers, Sprint is not acting as a telecommunications carrier within the meaning of the Telecommunications Act. The Telecommunications Act fundamentally restructured local telephone markets, particularly by subjecting ILECs to several duties intended to facilitate competition in the telecommunications market, the foremost of which is an ILEC's obligation to share its network, or interconnect, with competitors. *See AT & T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366, 371 (1999). Under the Telecommunications Act, "each telecommunications carrier has the duty to interconnect directly or indirectly with the facilities and equipment of other telecommunications carriers." 47 U.S.C. § 251(a)(1). The ILECs argue that Sprint is not acting as a "telecommunications carrier" with respect to its proposed service offering to Mediacom. The ILECs also maintain that they have an exemption from the duty to negotiate interconnection agreements with Sprint by virtue of their exemption under 47 U.S.C. § 251(f)(1) of the Telecommunications Act as rural telephone companies. Finally, the ILECs argue that the underlying

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1. For purposes of the Telecommunications Act, the term "exchange access" means "the offering of access to telephone exchange services or facilities for the purpose of the origination or termination of telephone toll services." 47 U.S.C. § 153(16). "Reciprocal compensation" is an "arrangement between two carriers . . . in which each of the two carriers receives compensation from the other carrier for the transport and termination of each carrier's network facilities of local telecommunications traffic that originates on the network facilities of the other carrier." 47 C.F.R. § 51.701(e).

service proposed to be used by Mediacom for originating calls from or terminating calls to the proposed Mediacom end users is packet-switched Internet protocol ("IP") or so-called Voice over Internet Protocol ("VoIP") telephony, rather than standard circuit switched telephone service, and therefore is an "information service," rather than a "telecommunications service" for purposes of the Telecommunications Act.

The Court examines first the question of whether Sprint is a telecommunications carrier within the meaning of the statute. The Telecommunications Act defines the term "telecommunications carrier" as "any provider of telecommunications services, except that such term does not include aggregators of telecommunications services (as defined in section 226 of this title)." 47 U.S.C. § 153(44). The statute provides further that "[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." *Id.* The Telecommunications Act defines the term "telecommunications service" as "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 U.S.C. § 153(46). To be a telecommunications carrier under within the meaning of the statute, Sprint must hold itself out "indiscriminately to the clientele one is suited to serve." *National Ass'n of Regulatory Utility Comm'rs v. FCC*, 525 F.2d 630, 641 (D.C. Cir. 1975). *See also Virgin Islands Tel. Corp. v. FCC*, 198 F.3d 921, 927 (D.C. Cir. 1999) ("[T]he key determinant whether a carrier is a [telecommunications] carrier is . . . the characteristic of holding oneself out to serve indiscriminately. . . ."); *National Ass'n of Regulatory Util. Comm'rs v. FCC*, 533 F.2d 601, 608

(D.C. Cir. 1976) ("The primary sine qua non of [telecommunications] carrier status is a quasi-public character, which arises out of the undertaking . . . to carry for all people indifferently. . . ."). A telecommunications carrier's services need not be available to the entire public, as one may be a carrier although the nature of the service rendered is "sufficiently specialized as to be of possible use to only a fraction of the total population," although a party will not be deemed to be a telecommunications carrier if its practice is to make individualized decisions, in particular cases, whether and on what terms to deal. *National Ass'n of Regulatory Utility Comm'rs*, 525 F.2d at 641. "The key factor is that the operator offer indiscriminate service to whatever public its service may legally and practically be of use." *Id.* at 642. Further, the services must be "effectively available directly to the public." 47 U.S.C. § 153(46). The core of the challenge raised by the ILECs to Sprint's status as a telecommunications carrier is that Sprint is not holding itself out indiscriminately to the clientele one is suited to serve, which here, the ILECs contend, are entities that have last mile facilities suitable to function as residential loops, because Sprint holds the pricing of its wholesale services confidential and provides its wholesale services to the last-mile providers under privately negotiated, individually crafted agreements.

Sprint responds that, as its wholesale service tariff reflects, it incorporates individual case basis pricing, rather than fixed published rates, when contracting with cable companies. Sprint's position is that neither the negotiation of individual contracts with cable companies, nor the absence of a single published price list, detracts from Sprint's status as a telecommunications carrier entitled to request interconnection with the ILECs. Sprint's position is that it offers its services to such classes of users as to be effectively available directly to the public, regardless of the facilities used, in an indiscriminate manner to whatever public its services may legally and practically be of use.

The Court agrees. Based on Sprint's business model, without Sprint's services, the end-user customer who subscribes to the Sprint-Mediacom service would be incapable of placing or receiving telephone calls, as Sprint's switch performs all switching and routing functions for local, domestic, and foreign toll, emergency, operator assisted, and directory assistance calls. Thus, Sprint provides telecommunication services, and does so in a manner that offers indiscriminate service which is "effectively available directly to the public." Further, Sprint's involvement in the joint provisioning of local telephone exchange service supports the conclusion that Sprint is a telecommunications carrier. *See Berkshire Tel. Corp. v. Sprint Communications Co., L.P.*, No. 05-CV-6502, 2006 WL 3095665, at *6 (W.D.N.Y. Oct. 30, 2006) (holding that Sprint is a telecommunications carrier within the meaning of the Telecommunications Act because "the services Sprint is providing . . . will be available to any end user within the specified service territory, albeit through the business relationship with [a cooperating cable company]" providing the local loop while Sprint provided the end office switch and interconnection trunk).

In this connection the Court finds persuasive the recent declaratory ruling of the Federal Communications Commission ("FCC") in which the FCC reaffirmed that "wholesale providers of telecommunications services are telecommunications carriers for the purposes of [47 U.S.C. §§] 251(a) and (b) of the [Telecommunications] Act, and are entitled to the rights of telecommunications carriers under that provision." *In re Time Warner Cable*, 22 F.C.C.R. 3513, 3513, 2007 WL 623570 (F.C.C. Mar. 1, 2007). Further the FCC decision provides, "[we] conclude that state commission decisions denying wholesale telecommunications service providers the right to interconnect with incumbent [local exchange carriers] pursuant to sections 251(a) and (b) of the Telecommunications Act are inconsistent with the Telecommunications Act and Commission

precedent and would frustrate the development of competition . . . ." *Id.* "[W]e affirm today the rights of all wholesale carriers to interconnect when providing service to other providers. . . ." *Id.* at 3519 n.33 (emphasis omitted). By its decision, the FCC declared that the Telecommunications Act does not differentiate between the provision of telecommunications services on a wholesale basis or on a retail basis and that providers of wholesale telecommunications services enjoy the same rights as any telecommunications carrier under the Telecommunications Act. In this instance, Sprint's services, specifically, its connection and switching services, will be of use to the cable companies and any who have comparable last mile facilities suitable to function as residential loops as well as the end-user customer indiscriminately. Regardless of any agreement Sprint may negotiate with a participating cable company, or entity that has last mile facilities suitable to function as residential loops, Sprint's services will reach all end-user customers indiscriminately.

Turning then to the question of whether the so-called "rural exemption" under 47 U.S.C. § 251(f)(1) frees them from the duties imposed by 47 U.S.C. § 251(b) with respect to resale of telecommunications services, number portability, dialing parity, access to rights-of-way, and reciprocal compensation. Under 47 U.S.C. § 251(f), rural ILECs are exempt from the requirements of 47 U.S.C. § 251(c)(1), which obligates all incumbent LECs to negotiate in good faith terms and conditions of agreements fulfilling the obligations established for all LECs (both incumbent and competitive) in 47 U.S.C. § 251(b). The ILECs argue that their duty to negotiate the obligations of 47 U.S.C. § 251(b) arise from 47 U.S.C. § 251(c), so that if the latter subsection of the statute does not apply to them, neither does the former. The Court does not agree. Section 251(b) establishes obligations of all LECs independent from any exemption of Section 251(c) for rural ILECs. Because Sprint seeks to interconnect under 47 U.S.C. § 251(a)

and (b), 47 U.S.C. § 251(f)(1) provides no exemption for the ILECs from the obligations imposed in 47 U.S.C. § 251(b). This position is consistent with the statutory language and the FCC's treatment of this issue. As the FCC declared recently, "state commission decisions denying wholesale telecommunications service providers the right to interconnect with incumbent LECs pursuant to sections 251(a) and (b) of the Act are inconsistent with the Act and Commission precedent and would frustrate the development of competition and broadband deployment . . . . We further conclude that such wholesale competition and its facilitation of the introduction of new technology holds particular promise for consumers in rural areas." *In re Time Warner Cable*, 22 F.C.C.R. at 3519, 3520, 2007 WL 623570.

Finally, the Court rejects the position of the ILECs that Sprint provides an "information service" rather than a "telecommunications service" for purposes of the Telecommunications Act. The fact that, as noted, the underlying service proposed to be used by Mediacom for originating calls from or terminating calls to the proposed Mediacom end users is packet-switched VoIP telephony, rather than standard circuit switched telephone service, has no bearing on the duty of the ILECs to interconnect with Sprint. As the FCC clarified recently, "[t]he regulatory classification of the service provided to the ultimate end user has no bearing on the wholesale provider's rights as a telecommunications carrier to interconnect under [47 U.S.C. §] 251. As such, we clarify that the statutory classification of a third-party provider's VoIP service as an information service or a telecommunications service is irrelevant to the issue of whether a wholesale provider of telecommunications may seek interconnection under section 251(a) and (b)." *In re Time Warner Cable*, 22 F.C.C.R. at 3520, 2007 WL 623570. The Court concludes that the ILECs have failed to show a reasonable likelihood of success on the merits.

The Court finds further that the balance of harms does not favor a grant of injunctive relief in this case. The injunction sought in this case is mandatory in that it seeks to reverse the ICC's orders and to require all former customers of the ILECs who have switched to Sprint's service to switch back to their former providers. Typically, the purpose of a preliminary injunction is to maintain the status quo pending the resolution of the merits of a case. *See Jordan v. Wolke*, 593 F.2d 772, 774 (7th Cir. 1978); *Desert Partners, L.P. v. USG Corp.*, 686 F. Supp. 1289, 1293 (N.D. Ill. 1988). While mandatory preliminary injunctions are to be "cautiously viewed and sparingly issued," there are "situations justifying a mandatory temporary injunction compelling the defendant to take affirmative action." *Jordan*, 593 F.2d at 774. For example, where the harm is substantial and maintaining the status quo would mean further harm and possibly make a final determination on the merits futile, the grant of a mandatory preliminary injunction may be appropriate. *See Ferry-Morse Seed Co. v. Food Corn, Inc.*, 729 F.2d 589, 593 (8th Cir. 1984); 11A Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, *Federal Practice & Procedure* § 2947 (3d ed. 1998 & Supp. 2007). Nonetheless, a mandatory preliminary injunction should not be granted unless the law and facts clearly favor the plaintiff. *See Committee of Cent. Am. Refugees v. INS*, 795 F.2d 1434, 1441 (9th Cir. 1986). Also, a mandatory preliminary injunction that grants the full relief requested is viewed with greater disfavor than one that grants less than the full relief. *See Bricklayers, Masons, Marble & Tile Setters, Protective & Benevolent Union No. 7 of Neb. v. Lueder Constr. Co.*, 346 F. Supp. 558, 561 (D. Neb. 1972); 11A Wright, Miller & Kane, *Federal Practice & Procedure* § 2948.

In this instance, the Court has no difficulty concluding that the extraordinary remedy of a mandatory injunction is not warranted in this case. At the hearing on the requested injunction, it was

established that, since Sprint's operations with Mediacom commenced in the relevant service areas, Harrisonville Telephone Company has lost thirteen customers, Marseilles Telephone Company has lost approximately 35 customers, and Metamora Telephone Company has lost approximately 135 customers. Given that Harrisonville Telephone Company has approximately 19,700 subscribers, Marseilles Telephone company has approximately 3,600 subscribers, and Metamora Telephone Company has approximately 4,000 subscribers, it hardly appears from the record that the ILECs are suffering irreparable harm as a result of the operations of Sprint and Mediacom in their service areas. Further, although Sprint has not monetized the extent of the loss it would suffer were the Court to take the extraordinary step of requiring all Sprint-Mediacom subscribers to switch back to the ILECs, Sprint presented credible testimony by Darren Liston, a marketing manager and technical support operative for the company, that Sprint would be significantly hampered in its ability to penetrate rural telephone markets through agreements with cable companies like Mediacom were the requested injunction to be granted. Under these circumstances, the Court cannot conclude that the balance of harms favors an award of mandatory injunctive relief. *See Illinois Bell Tel. Co. v. Hurley*, No. 05 C 1149, 2005 WL 735968, at *7 (N.D. Ill. Mar. 29, 2005) (denying a request for a preliminary injunction by an incumbent telecommunications carrier because the incumbent would suffer no significant loss of reputation in merely being required to compete with other carriers, but the competing carriers would incur a severe loss of reputation if they could not deliver services after promoting them to customers).[2]

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2. In this connection, the Court notes that the ILECs have made no offer to post an injunction bond to indemnify Sprint for loss resulting from the requested injunction, even though such a bond is mandatory under Rule 65 of the Federal Rules of Cvil Procedure. *See* Fed. R. Civ. P. 65(c).

Finally, the Court concludes that the requested injunction is not in the public interest. As discussed, Congress passed the Telecommunications Act to open local telecommunications markets to competition. *See AT & T Corp.*, 525 U.S. at 371. Specifically, Congress enacted the Telecommunications Act "[t]o promote competition and reduce regulation in order to secure lower prices and higher quality services for American telecommunications consumers and encourage the rapid deployment of new telecommunications technologies." Pub. L. No. 104-104, 110 Stat. 56, 56 (1996). The purpose of the injunction sought by the ILECs is clearly contrary to the public interest in competition in the telecommunications industry sought to be furthered by the Telecommunications Act. *See Michigan Bell Tel. Co. v. MFS Intelenet of Mich., Inc.*, 16 F. Supp. 2d 828, 833 (W.D Mich. 1998) (denying a preliminary injunction where "the incumbent Plaintiff has in effect blocked the competition the Act seeks to encourage").

To conclude, the motion for a preliminary injunction brought by Plaintiffs Harrisonville Telephone Company, Marseilles Telephone Company, and Metamora Telephone Company (Doc. 37) is **DENIED**.

IT IS SO ORDERED.

DATED: September 5, 2007

S/G. Patrick Murphy
G. PATRICK MURPHY
Chief United States District Judge