

0001

1 BEFORE THE WASHINGTON UTILITIES AND TRANSPORTATION
2 COMMISSION

3 In the Matter of the Petition)
of Sprint Communications) DOCKET NO. UT-073031
4 Company, L.P. for Arbitration) Volume I
with Whidbey Telephone) Pages 1 - 30
5 Company.)

6
7 A prehearing conference in the above matter
8 was held on November 26, 2007, at 1:32 p.m., at 1300
9 South Evergreen Park Drive Southwest, Olympia,
10 Washington, before Administrative Law Judge ADAM TOREM.

11

12 The parties were present as follows:

13 SPRINT COMMUNICATIONS COMPANY, by JUDITH A.
ENDEJAN, Attorney at Law, Graham & Dunn, 2801 Alaskan
14 Way, Suite 300, Seattle, Washington 98121; telephone,
(206) 340-9694.

15

16 SPRINT NEXTEL, by KRISTIN L. JACOBSON,
Regulatory Attorney, 201 Mission Street, Suite 1400,
San Francisco, California 94105; telephone, (707)
17 816-7583.

18 SPRINT NEXTEL, by JEFFREY PFAFF (via bridge
line), Regulatory Attorney, 6450 Sprint Parkway, Third
19 Floor, Overland Park, Kansas 66251; telephone, (913)
315-9294.

20

21 WHIDBEY TELEPHONE COMPANY, by RICHARD A.
FINNIGAN, Attorney at Law, 2112 Black Lake Boulevard
Southwest, Olympia, Washington 98512; telephone, (360)
22 956-7001

23

24 Kathryn T. Wilson, CCR

25 Court Reporter

0002

1 P R O C E E D I N G S

2 JUDGE TOREM: Let's be on the record in
3 Docket UT-073031. Today is Monday, November 26th,
4 2007. It's a little bit after 1:30 p.m., and this is a
5 petition of Sprint Communications Company for
6 arbitration with Whidbey Telephone Company. This
7 arbitration is being requested under Section 252(b) of
8 the Telecommunications Act of 1996.

9 My name is Adam Torem. I'm the
10 administrative law judge presiding on behalf of the
11 Washington Utilities and Transportation Commission.
12 This prehearing conference is being held today as
13 scheduled with Order 01, Paragraph 14, which was sent
14 out in late October of this year.

15 According to that, in fact according to our
16 record, Sprint filed its petition on October 17th,
17 2007, and it arrived here at this Commission. Let's
18 take appearances now from Sprint today.

19 MS. ENDEJAN: Thank you, Your Honor. My name
20 is Judy Endejan, and I'm with Graham and Dunn, PC.
21 Address is 2801 Alaskan Way, Seattle, 98121. My
22 telephone number is (206) 340-9694, and my fax is (206)
23 340-9599. My e-mail address is
24 jendejan@grahamdunn.com. Also appearing with me is
25 Kristin Jacobson for Sprint and Jeff Pfaff on the

0003

1 phone. Kristin, would you like to state your full name
2 and address, and Jeff as well?

3 MS. JACOBSON: My name is Kristin Jacobson,
4 K-r-i-s-t-i-n, J-a-c-o-b-s-o-n. I'm a regulatory
5 attorney for Sprint Nextel. My e-mail address is
6 kristin.l.jacobson@sprint.com, and my telephone number
7 is (707) 816-7583, and Jeff, do you want to give your
8 contact information?

9 MR. PFAFF: I sure will; thank you. This is
10 Jeff Pfaff, P-f-a-f-f. I'm with Sprint Nextel. My
11 address is 6450 Sprint Parkway, Third Floor, Overland
12 Park, Kansas, 66251. My e-mail address is
13 jeff.m.Pfaff@sprint.com, and my phone number is (913)
14 315-9294. Thank you.

15 JUDGE TOREM: And for Whidbey Telephone?

16 MR. FINNIGAN: I do want to note for the
17 record that as with our other appearances today, until
18 the jurisdictional issue is resolved, we are making a
19 special appearance, and so for that purpose, it's
20 Richard A. Finnigan. The mailing address is 2112 Black
21 Lake Boulevard Southwest, Olympia, Washington, 98512;
22 telephone, (360) 956-7001. Fax is (360) 753-6862, and
23 e-mail is rickfinn@localaccess.com.

24 JUDGE TOREM: You have some of your clients
25 with you today?

0004

1 MR. FINNIGAN: Yes. They are not appearing
2 in any sort of representational capacity, but in
3 attendance are Bruce Russell and Rob Snyder.

4 JUDGE TOREM: Thank you. On the conference
5 bridge, I think we've addressed all the folks that need
6 to make an appearance for Sprint. Is there anyone else
7 on the conference bridge who needs to make an
8 appearance today? Hearing none, we will move on to the
9 order of business for today's prehearing conference.

10 What I wanted to accomplish first as promised
11 in one of the notices that went out the week of
12 November 5th was to give you my very brief verbal
13 ruling on the motion to dismiss. We'll come back to
14 that in just a moment. We are also going to talk about
15 the schedule that's going to be required for the
16 arbitration and then as needed go through the listing
17 of disputed issues and sort out whether the parties
18 wish to do this with a hearing with witnesses or wish
19 to simply to file briefs and have an arbitrator's
20 report at the conclusion of the appropriate period, and
21 we will have to talk about the deadlines and dates
22 necessary. We will probably do that mostly off the
23 record.

24 Now, in the motion to dismiss, Mr. Finnigan,
25 you filed that on November the 2nd, 2007, and there was

0005

1 a response from Ms. Endejan on November the 13th, 2007,
2 in accordance with one of the deadlines set that week
3 of November 5th. There were four issues raised, and I
4 looked at the original motion as filed and did some
5 research on my own and then looked at what also came in
6 on the response from Ms. Endejan.

7 The first issue with the petition was timely
8 filed within the statutory time frame, and there was a
9 question as to what date to begin counting and whether
10 or not that would be timely. Mr. Finnigan, I found
11 that it was timely filed so I could not rule and
12 dismiss the case based on that. I wasn't sure if it
13 had even been untimely filed that that would have been
14 a defeating and fatal error based on the reading of the
15 Telecom Act and its underlying intent.

16 Second issue was whether it was proper for
17 this petition to be served on Mr. Snyder, and I found
18 that it was proper to be served on Mr. Snyder based on
19 his role in the negotiations and how Whidbey had
20 identified him to serve in that capacity. Looking at
21 the language of the Telecom Act, I concluded it was
22 proper to serve the petition on Mr. Snyder.

23 The requirement that came up in the third
24 issue that was raised in your motion was whether or not
25 the petition had to be verified, and when I looked at

0006

1 our own Commission rules on verification, it did not
2 apply in this setting and would only have applied if
3 Sprint was not represented by counsel, so that was not
4 an issue. Even if Sprint had not been represented by
5 counsel, we looked at that and I thought, this is
6 something I could have incurred and would not have been
7 defeating for jurisdiction within the spirit of the
8 rules.

9 And finally, the overall question of whether
10 the Commission had jurisdiction in this situation, I
11 wasn't persuaded by the arguments raised in the motion
12 to dismiss. It seemed like the plain language of the
13 Telecom Act granted jurisdiction, and the argument you
14 made about voluntary negotiations and not having any
15 negotiations yet entered into, which was also raised
16 again in your response to the petition itself filed on
17 November the 16th, it seemed that that would put one
18 party at loggerheads with the other in able to drive
19 things further away and keep jurisdiction from ever
20 existing and then to read the act in that regard. So I
21 intend to reduce those rulings to writing and have an
22 order out denying the motion to dismiss later this
23 week.

24 From there, if there is an appeal of any sort
25 that you would wish to take, Mr. Finnigan, you can do

0007

1 that at the appropriate time, but I wanted to give you
2 a quick summary as to the four issues that you raised
3 and the responses from Ms. Endejan and reviewed
4 Commission rules and the Telecom Act myself and came to
5 those four conclusions that the motion itself had to be
6 denied, but again, my goal would be on Thursday or
7 Friday of this to serving the written order, so that
8 will be November 29th or November 30th.

9 At this time, I want to turn to WAC
10 480-07-630, and that's the basis upon which this
11 petition for arbitration was filed, and also discusses,
12 I believe, the third basis of the motion, which was for
13 verification. All the rules about what we need to do
14 in this case are set out there, but how to schedule
15 everything in with the Federal Act nine-month deadline,
16 which I believe in Order 01 in this case is set at
17 February 11th, 2008, or if you look down to 480-07-630,
18 Sub 11(b), that requires the final order from the
19 arbitrator 110 days after the filing. My calculation
20 would have been February 4th, 2008. So we have
21 essentially two full months, December 2007 and January
22 2008, in which to schedule and complete the arbitration
23 and give me sufficient time to render that arbitrator's
24 order in early February.

25 It's your petition, Ms. Endejan, I believe,

0008

1 these rules can be waived, both the federal deadline
2 and the regulatory one from the Commission, and I
3 wanted to know if you were able to entertain extending
4 that for a reasonable period of time if necessary.
5 That may depend a lot on discussions of how and what we
6 want to accomplish in those two full months we have in
7 the days left in November and early February.

8 MS. ENDEJAN: Yes, Judge Torem. It's
9 Sprint's position that we are amenable to a reasonable
10 extension of time to assist the Commission in doing the
11 work that needs to be done to bring this matter to a
12 close in terms of ending up with hopefully an
13 arbitrated agreement. What that end deadline will be
14 will become evident as we have our discussions off the
15 record about what would work or not work in terms of
16 scheduling, but we are amenable to a possible
17 reasonable extension.

18 JUDGE TOREM: I appreciate that, and we will
19 take that into consideration when we get into the
20 scheduling. It seems to me that the items we need to
21 discuss when we get ready to go off the record are a
22 listing of those disputed issues, and I saw as required
23 by the rule, Paragraphs 15 and 16 of the petition, lays
24 out what Sprint has as a brief statement of unresolved
25 issues, and from my review of Mr. Finnigan's response,

0009

1 his Section 4, Paragraphs 14 through 18, ask for
2 certain threshold issues to be determined, and then
3 going on to the following page to respond to those
4 listed out by Sprint, so Pages 7 and 8 are a little bit
5 beyond in the answer to the petition.

6 There is an indication from Mr. Finnigan,
7 correct me if I'm wrong, that you would like to see the
8 threshold issues resolved first and then get into the
9 other issues that are unresolved substantive form as
10 raised in the petition. So let me ask you to lay out
11 what you are suggesting for handling of this because
12 you made a suggestion in your answer, and also to ask
13 if at this time prior to resolution of those threshold
14 issues, which won't be accomplished today, if you want
15 to change Whidbey's appearance from a special
16 appearance to a more general one or reiterate a special
17 appearance for the purpose of those threshold issues.

18 MR. FINNIGAN: I'll take the last item first.
19 Until we have a chance to actually see your order on
20 jurisdiction, I think it would be premature to change
21 the nature of the appearance. I understand what you've
22 announced today from the Bench but would still like to
23 see what goes into the order itself.

24 But that said, as we've been trying to
25 proceed throughout this, we are trying to make sure we

0010

1 don't just throw that up as a loggerhead and say we
2 won't do anything until that time. So we are certainly
3 willing to work on a schedule today and talk about some
4 of the other issues. We do think it's important that,
5 as you've seen from the petition and the answer, those
6 what we've identified as threshold issues have really
7 been the key items that have stood in the way of making
8 further progress, and so we really do think it would be
9 beneficial to try to resolve those up front as the
10 first step.

11 As you can see from the form of agreement
12 that we attached to the answer, there is a lot there
13 that could probably be fairly easily resolved. There
14 are some other issues that would need further
15 discussion, and part of our request is that once the
16 threshold issues are resolved that the parties be given
17 time to negotiate the terms of the agreement, because I
18 think we can reduce that down to a fairly few set of
19 outstanding issues, or perhaps resolve them all, but
20 it's the threshold issues that are really standing in
21 the way.

22 JUDGE TOREM: Ms. Endejan, on these three
23 threshold issues that are layed out this time around
24 that's relevant to today in the response to the answer
25 to the petition, how would Sprint prefer to proceed

0011

1 with this?

2 MS. ENDEJAN: Well, Your Honor, first of all,
3 it has been Sprint's position all along, and Sprint has
4 explained to Whidbey time and again this position,
5 which is are these threshold issues, in fact,
6 nonissues. They have been resolved definitively by the
7 Federal Communications Commission which has ruled on
8 all the points raised by Whidbey. It has ruled that
9 Sprint, my client, is indeed a telecommunications
10 carrier who acting as a wholesale provider of such
11 services is entitled by law to an interconnection
12 agreement with Whidbey. So the issue of whether Sprint
13 is a telecommunications carrier has been resolved in
14 this circumstance.

15 The second point raised about the status of
16 Sprint's wholesale customer is totally irrelevant, as
17 has been made clear, and I would direct you to
18 Paragraphs 8 and 9 of the FCC order as well as the
19 numerous Commission decisions and court decisions in
20 the states of Iowa, Illinois, Indiana, New York, Ohio,
21 Nebraska, and Texas. So these issues were raised by
22 Whidbey in Sprint's view simply for the purpose of
23 delaying and preventing Sprint from beginning to
24 operate pursuant to an arrangement that the FCC has
25 said is totally lawful.

0012

1 Now, we believe that these are bogus issues
2 that are designed to run out the clock and that they
3 have been asserted to avoid actually getting down to
4 the nitty-gritty of negotiations. Now, I have copies
5 of the decisions. The FCC order was attached to our
6 petition to arbitrate. Now, if the Commission and
7 yourself would find it useful for further briefing on
8 this topic, we would be prepared to do so. In our
9 view, we don't think it's necessary because the law is
10 so very clear, and the FCC couldn't be clearer in
11 Paragraphs 8 and 9.

12 So given that, we think that the parties, and
13 given the -- how should we say -- pattern of conduct
14 between the parties here, Sprint is very concerned
15 about Whidbey's willingness to, in fact, negotiate on
16 some issues, and without a firm deadline by which the
17 parties must submit a disputed issues list, we don't
18 think they will talk to Sprint.

19 So we think that for purposes of scheduling
20 today, we need to set a deadline by which we would
21 submit the remaining issues. That would force the
22 parties in the several week time period to come to the
23 table and talk, because otherwise, there will be
24 absolutely no impetus, and this will just continue to
25 be stretched out and stretched out as it's been. After

0013

1 that, the parties can -- I guess we will discuss this
2 off the record whether we go strictly on the pleadings
3 route or whether we choose or the parties agree it
4 would be better to have prefiled testimony. We can
5 schedule that appropriately. So at this point, I don't
6 know what would best assist the Commission, but we
7 certainly don't think that these bogus threshold issues
8 that have been raised by Whidbey should stand in the
9 way of proceeding.

10 MR. FINNIGAN: If I might, we certainly take
11 offense at being labeled as having raised bogus issues.
12 We don't think that any of these three issues fit that
13 description. We obviously have a very different view
14 of the FCC's order. We've addressed that. We've
15 addressed Whidbey's view in the brief that accompanied
16 the response.

17 With respect to authority, Whidbey requested
18 from Sprint on several occasions supporting authority
19 for their position. Sprint, other than providing a
20 copy of the FCC order, which we read differently,
21 didn't provide anything. As we pointed out, we found
22 the Texas case through our own research, and quite
23 frankly find that it supports our position. In Texas,
24 Sprint has a tariff that applies to the type of
25 offering that it wants to offer in the state of

0014

1 Washington.

2 In addition, although we don't know the
3 details of it, it's clear from the way the decision was
4 written that there was a great deal of information
5 provided about the business relationship between Sprint
6 and its wholesale carrier in that particular
7 proceeding. That's the information that Whidbey had
8 requested and so could evaluate the position and
9 determine whether it was taking an erroneous position.
10 That information was not provided and still has not
11 been provided, so we are still in a position of not
12 being able to agree that given the facts that would
13 apply to Sprint's operation in the state of Washington
14 and its relationship with its wholesale carrier in the
15 state of Washington, it meets the requirements that the
16 FCC has set forth saying under this set of
17 requirements, we believe that this relationship is an
18 appropriate one for an interconnection agreement to be
19 negotiated by Sprint on behalf of its wholesale
20 carrier.

21 So that's why we say there are these
22 threshold issues, and one of the things we've
23 identified is the information that should be produced
24 so that that relationship can be examined and we can
25 find out, does it meet the FCC's test or not.

0015

1 JUDGE TOREM: Your answer suggested that the
2 Commission should request that information from Sprint
3 because they have not yet produced it to you?

4 MR. FINNIGAN: That's correct. If you wanted
5 to just make a formal request in this proceeding to see
6 if they will now do it, we can do that, but we think
7 that information in the items we laid out should be
8 produced because then we can sit there and say yes,
9 this meets the FCC's test, or no, it does not, and that
10 will provide us the basis that we can try to resolve
11 these threshold issues.

12 We think the record shows that Whidbey has
13 been very forthcoming in making detailed requests of
14 what it would need to see, and even in our answer
15 laying out saying this is the type of information we
16 think should be produced so we can know that we are not
17 being asked to engage in activities that we shouldn't
18 be engaging in.

19 MS. ENDEJAN: I might respond. The FCC very
20 clearly said that the statutory classification of the
21 end-user service and customer are not dispositive and
22 do not bear on the wholesale carrier's rights. The FCC
23 in looking at the quote, business relationship there
24 between Sprint and its wholesale customer was
25 confronted with the exact same situation as here, and

0016

1 there was no underlying tariff in Nebraska. It was a
2 commercial arrangement between Sprint and a cable
3 provider to provide VOIP service, the whole package.
4 The FCC looked at it and said, good idea. It would
5 encourage competition, and we are not going to let the
6 arguments basically raised by similarly situated local
7 small companies to stand in the way.

8 Now, I think that Whidbey disagrees with the
9 FCC's reading of the order because Whidbey just refuses
10 to accept the law and what is. I'm sure if the
11 Commission were to read the FCC's order, it could not
12 be clearer, so therefore, going down the bunny trail
13 requiring Sprint to produce its agreement with the
14 underlying cable provider and a whole bunch of other
15 information that is basically irrelevant is just going
16 to cause further delay.

17 So we think that the Commission should read
18 the FCC order, which preempts on the issues such as 251
19 and 252, any inconsistent state rulings as was made
20 clear in the cases, the Texas decision, which, by the
21 way, was brought to his attention in the response to
22 the motion to dismiss in fact supports Sprint's
23 wholesale model, and common sense, logic, and the law
24 seem to suggest that why would Sprint be doing anything
25 that it was not lawfully entitled to do here in

0017

1 Washington any differently than it was doing in all of
2 those other states that have looked at this question
3 and the FCC.

4 JUDGE TOREM: Let me interrupt and say that
5 it sounds that both parties feel that they've provided
6 for the Commission's review sufficient briefing and
7 argument for these threshold issues to be resolved.
8 Ms. Endejan, you've indicated as much, that if we want
9 more briefing you could provide it?

10 MS. ENDEJAN: Absolutely.

11 JUDGE TOREM: It doesn't sound as if Sprint
12 wishes to do so or feels it's necessary.

13 MS. ENDEJAN: I have brought copies with me,
14 Your Honor, of the FCC order and the court cases and
15 Commission decisions. We think that a straightforward
16 plain reading of the FCC order should resolve these
17 issues once and for all.

18 JUDGE TOREM: I would be happy to take those
19 and put them under consideration to your submission at
20 the appropriate time today. Mr. Finnigan, what is
21 Whidbey's position as to the need for further briefing?

22 MR. FINNIGAN: Your Honor, I think the issues
23 on the law are fairly clear. The issues on the facts
24 to which the law would be applied are not, and that's
25 what our position is, is that in order to be a

0018

1 telecommunications carrier for purposes of the FCC's
2 order, the Sprint offering has to be something more
3 than a private carriage offer, if you will, to put it
4 in transportation terms. It has to be indiscriminately
5 offered, and by our request for information, we are
6 trying to see if that is, in fact, the case, that they
7 will fit within the FCC's order in terms of making an
8 offer to provide services on an indiscriminate basis.
9 So in one sense, we think the issues to be examined
10 from a legal standpoint are pretty clear. It's the
11 question of what facts will that law apply to.

12 JUDGE TOREM: So let me suggest the following
13 then. You are saying that on the law, the briefing is
14 sufficient, but again, based on what you have on Page
15 30, 31, 32 of your answer, there are certain facts that
16 the Commission would need to address this which you
17 have not been provided with, and you think that the
18 Commission should have those facts in order to render a
19 decision that's complete and correct on this matter.

20 MR. FINNIGAN: Yes, Your Honor.

21 JUDGE TOREM: And Ms. Endejan is taking the
22 position for Sprint that this information would be
23 surplus and is not necessary. Is that correct,
24 Ms. Endejan?

25 MS. ENDEJAN: And also basically irrelevant.

0019

1 The relationship between Sprint and its customer is not
2 relevant. We are talking about the relationship
3 between Sprint and Whidbey.

4 MR. PFAFF: Your Honor, this is Jeff Pfaff
5 with Sprint, and I agree. Obviously, Ms. Endejan has
6 stated our position accurately and succinctly. The
7 only thing I would offer is that if the Commission
8 would find it helpful, Sprint would be willing to
9 provide an affidavit that would indicate that our
10 offering would plan for an indiscriminate offering of
11 services that we are a telecom carrier, and we
12 affirmatively state that we will be bound by those
13 obligations and that the offering jointly with the
14 cable provider will allow for the residents of
15 Washington to obtain VOIP services.

16 We would be happy to provide an affidavit
17 along those lines if that would be satisfactory, but as
18 Ms. Endejan said, getting into the relationship between
19 ourselves and our customers is something that's not
20 required by either the FCC's order or the various
21 states' federal court decision that have reviewed this.
22 Thank you.

23 JUDGE TOREM: Let me suggest then to all the
24 parties that this set of threshold issues is
25 essentially already submitted, and because of the

0020

1 posture of the submission needs to be resolved one way
2 or the other for this case. I do also hear what
3 Ms. Endejan is saying on behalf of Sprint, that any
4 delay in this and putting this as a prerequisite to
5 coming to the table to discuss the other issues may
6 result in inordinate delay.

7 Neither of you are privileged to know what my
8 schedule might be to get to that, so what I want to do
9 is discuss a potential road map to get through not only
10 the threshold issues but also the other issues that
11 have been identified as disputed when we go off the
12 record. If we can keep them together, great. If we
13 need to put them on a parallel track so that I may be
14 resolving this set of the issues while you are
15 resolving the others, that may be an option as well.

16 I'm disinclined to put this one as a hurdle
17 to be cleared before the parties in front of me start
18 talking about the other issues. It hopefully can be
19 done quickly so that if I find that Mr. Finnigan's
20 arguments do turn out to be persuasive and there is no
21 need to go further, there will be a minimal amount of
22 work done or potentially wasted, and it may be that any
23 work that I've now characterized as potentially wasted
24 could be relied upon in a future proceeding if there is
25 something that Sprint needs to do to come back, refile,

0021

1 and reinstitute its negotiations on a second round.
2 I'm confident that nothing that would go on to
3 resolving or identifying to begin with the disputed
4 issues in the interconnection agreement that effort
5 will not be in vain. We will get to something
6 eventually, unless there is something jurisdictionally
7 as a roadblock to this.

8 I haven't seen it in my initial review of
9 this, but I do want to resolve these other issues in an
10 appropriate fashion, but I don't want it to be a delay
11 to the rest. So when we go off the record, let's try
12 to find an appropriate and perhaps even mutually
13 agreeable methodology to efficiently handle this at the
14 same time as the other parties get into negotiations,
15 and Mr. Finnigan, as you've said, many of those other
16 issues that have been waiting may yet be resolvable, so
17 if we work on a parallel track, that may be the
18 best-case scenario for progress on this case with some
19 respect to the early February deadlines we've already
20 discussed.

21 Now, aside from sorting out what the disputed
22 issues are, Sprint's perspective, Ms. Endejan, would
23 you want on those issues, assuming they remain
24 unresolved, a hearing or just simply filings on the
25 remaining unresolved issues?

0022

1 MS. ENDEJAN: For clarification, Your Honor,
2 do you mean with respect to the contract language?

3 JUDGE TOREM: Any of the other issues that
4 may come up in resolving the interconnection agreement
5 disputed language. Is there going to be a need for
6 other prefiled testimony or live witness testimony that
7 can be taken and hashed out in a hearing format, or
8 should it be more in the lines of legal arguments once
9 that language is preferable or more sufficient than the
10 other.

11 MS. ENDEJAN: Your Honor, I would like the
12 opportunity to consult further with my clients before
13 we finally land on a position, because I can see
14 advantages to both paths, because sometimes you
15 accomplish more by getting a witness in a chair talking
16 about issues and getting those resolved more quickly
17 than doing it on paper.

18 That tends to be the case when we are talking
19 about fact-related issues in an interconnection
20 agreement. If we are just arguing over preferred
21 language, then that's simply two lawyers talking about
22 who says it better and what are the legal consequences.
23 So if we might have an opportunity when we break, I
24 would talk to Mr. Pfaff and Ms. Jacobson to figure out
25 ultimately where we are coming from on that.

0023

1 JUDGE TOREM: Mr. Finnigan, any initial
2 impressions along the same lines?

3 MR. FINNIGAN: No, Your Honor. I will need
4 to consult with my client as well.

5 JUDGE TOREM: Are there any other issues we
6 are going to need to discuss aside from a date for
7 filing an agreed list of disputed issues, perhaps a
8 date for resolution of these threshold issues, desired
9 date, and a question about written or live witness
10 testimony? Are those the major issues we need to
11 discuss and schedule when we come back?

12 MR. FINNIGAN: Yes, Your Honor. I do have a
13 couple of procedural issues to sort out. One is more
14 out of curiosity, and that's in WAC 480-07-630, sub 11,
15 subsection b, where it talks about the arbitrator's
16 exercise of authority and says the arbitration will be
17 conducted under the provisions of this rule, the
18 Commission's orders, plural, on arbitration procedure,
19 and other provisions of law, and I could only find one
20 order on arbitration procedure, so if there is more
21 than one, I certainly would need to know about it.

22 JUDGE TOREM: I'm not aware of any more than
23 perhaps the one you refer to. Which order is it?

24 MR. FINNIGAN: I'm referring to the
25 interpretive and policy statement that was issued in

0024

1 1997 or so. That's the only order that I could find
2 related to arbitration procedure, but I notice the rule
3 itself says it's multiple and says Commission orders.

4 JUDGE TOREM: I'm just looking again at the
5 date of the rule, and as much as it came out many years
6 after that interpretive policy statement, I think it's
7 just a forward-looking that in case there are any
8 future orders the Commission might issue, those would
9 also apply and the rule wouldn't have to be rewritten.
10 When I issue the prehearing conference order, if I see
11 anything about the interpretive and policy statements,
12 I will call it to your attention in this order.

13 MR. FINNIGAN: I would appreciate that, and
14 as I understood, Your Honor, one of the things we are
15 going to be talking about off the record then is the
16 procedure for the process for the disputed issues as
17 well as the process for the threshold issues and tie
18 those into the time line. Did I get that correct?

19 JUDGE TOREM: That's correct. Not seeing any
20 other issues then, it's now about ten minutes after
21 two. Let's take a brief recess. I know you want to
22 consult with your clients, and in the next five minutes
23 if you could do that, we will come back, and hopefully
24 within about 15 or 20 minutes, we'll be back on the
25 record. We are going to go off the record now.

0025

1 (Discussion off the record.)

2 JUDGE TOREM: It's now about five minutes to
3 three, and while we were off the record, the parties
4 had a little bit of a chance to talk on their own, and
5 we realize that there is going to be not enough time to
6 complete the prehearing conference this afternoon to
7 accommodate an appointment that I have at three
8 o'clock, so we are doing something a bit unusual.

9 The two-track item apparently is something
10 the parties would favor knowing that I would resolve
11 the threshold-disputed issues separately from whatever
12 might be unresolved in the interconnection agreement.
13 So we've agreed that the parties will file briefs
14 regarding the threshold issues, and Mr. Pfaff will file
15 an affidavit indicating Sprint's status as a
16 telecommunications agency and describe that. Sprint
17 will attach that to a brief that will come in on
18 December the 7th.

19 Ten days later on December 17th, Whidbey will
20 file its response, and I've indicated that on or before
21 Friday, January the 4th, 2008, is when I would be able
22 to issue the ruling on the threshold issues. That much
23 we've agreed upon, and that will be incorporated into a
24 prehearing conference order.

25 The remainder of the dates the parties are

0026

1 trying to work with, the disputed issues list as set
2 for that, a date for identifying witnesses as
3 necessary, and then sorting out when in January from
4 January 17th as the earliest date, and I'm available
5 that afternoon and the rest of January as needed. They
6 are trying to sort out when they would have a hearing,
7 but they haven't resolved that. They want to continue
8 to have discussions and compare some notes and
9 documents they've filed.

10 What I'm led to believe is that the two
11 parties can agree on a schedule and submit that and
12 then the prehearing conference would be done, and I
13 would just endorse that schedule. I've given them my
14 dates of unavailability in January and February to
15 incorporate into that. If for some reason the
16 discussions continuing today and later this week
17 between Sprint and Whidbey don't result in an agreed
18 schedule of deadlines, then they will let me know that
19 by later this week, and probably by Thursday afternoon
20 would be a good time to let me know, by close of
21 business Thursday, and I'm not going to issue any
22 written requirement on that, just tell both parties
23 that by close of business on Thursday, I will look for
24 a schedule or note saying we need to resume this
25 prehearing conference. If we resume or reschedule it

0027

1 on Friday, I will have staff call you and pick
2 something next week, the week of December 3rd, and we
3 will get together, whether it's by phone or in person,
4 and hammer out the kinks in that schedule and make it
5 happen.

6 MR. FINNIGAN: Just one clarification. Do I
7 understand it correctly that by requesting the
8 affidavit from Mr. Pfaff, that is in lieu of the
9 information that Whidbey suggested be produced?

10 JUDGE TOREM: Not necessarily. As I
11 understand our rules of procedure, I'm at liberty to
12 issue a Bench request at any time as needed. If I
13 think after reading the briefs I need that information
14 from Sprint, I will immediately issue that Bench
15 request the week of the 17th. As soon as I can, I'll
16 try to turn it around and hope that that sort of thing
17 can be issued within about seven to ten days, and who
18 knows, if the nature of what you are asking is
19 commercially significant or commercially sensitive,
20 then there may be a redacted copy or a confidentiality
21 agreement. I want to avoid that sort of thing, but it
22 may be that Mr. Pfaff, depending on what is in the
23 affidavit, does answer the mail. If it doesn't, I have
24 the Bench request as a tool that I can use, and I don't
25 want to have to send Sprint a Christmas present, but if

0028

1 necessary, I will, because I do want to keep that
2 January 4th date to issue something so everybody knows
3 where we stand on those threshold jurisdictional
4 issues.

5 MR. FINNIGAN: Thank you.

6 JUDGE TOREM: Ms. Endejan, is there anything
7 we've described in the schedule, what we've agreed so
8 far and what you hope to agree on, is that amenable?

9 MS. ENDEJAN: Except for the Christmas
10 present part.

11 MR. PFAFF: Along those lines, Judge, there
12 will be a lot of people unavailable during that week of
13 Christmas, so obviously, we will do our best to
14 accommodate any type of request that comes in.

15 JUDGE TOREM: Mr. Pfaff, what I'm hoping is
16 that I will know when I get your affidavit on the 7th
17 whether I'm going to need anything, and with a filing
18 date on the 17th, when I get Whidbey's filing, I will
19 know if they are suggesting any holes exist in that and
20 that I should issue the Bench request.

21 If they make that argument and I find it
22 persuasive, I may already have a draft Bench request
23 ready to go that afternoon or the following morning,
24 and depending on availability, we will see what comes
25 down the pike as necessary. If we need to extend these

0029

1 deadlines by a week, so be it. That will occur, but I
2 will wait from Ms. Endejan as your attorney saying,
3 please give us leave to file later because of
4 scheduling.

5 I don't want anybody anticipating this
6 request from the Bench and changing schedules
7 accordingly. Stick with what you've got planned, and
8 if it has to slide from January 4th to January 11th,
9 then trust me, I'm going to be sitting up in Skagit
10 county with hopefully little to do in the evenings, and
11 if I need to finish the order then, so be it.

12 MR. PFAFF: Thank you, Your Honor.

13 JUDGE TOREM: Is there anything else we need
14 to agree on or put on the record today?

15 MR. FINNIGAN: No.

16 MS. ENDEJAN: No.

17 JUDGE TOREM: I appreciate you guys being
18 sensitive to me keeping as much of this three o'clock
19 appointment as I can. I'll look for something Thursday
20 afternoon telling me that I have a schedule to endorse
21 and adopt as part of the prehearing conference order,
22 and if that's the case, this will truly be an
23 adjournment. If that's not the case, then we will be
24 at recess and resume accordingly sometime next week.
25 So I guess we are conditionally adjourned at three

0030

1 minutes after three.

2 (Prehearing concluded at 3:03 p.m.)

3

4

5

6

7

8

9

10

11

12

13

14

15

16

17

18

19

20

21

22

23

24

25